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No. 83-558

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

HENRI and MARY TATRO, individually and as Next Friends of AMBER TATRO, a Minor,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Court

BRIEF FOR RESPONDENTS

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March 23, 1984

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether clean intermittent catheterization for a child such as Amber Tatro is a "related service" within the meaning of the Education of the Handicapped Act, as amended.

2. Whether clean intermittent catheterization for a child such as Amber Tatro is a "supplementary aid or service" within the meaning of Section 612(5)(B) of the Education of the Handicapped Act, as amended.

3. Whether the requirement of clean intermittent catheterization as a related or supplementary service for a child such as Amber Tatro is a reasonable condition imposed on Petitioner for the receipt of federal funds under the Education of the Handicapped Act, as amended.

4. Whether clean intermittent catheterization for a child such as Amber Tatro is a reasonable accommodation pursuant to Section 504 of the Rehabilitation Act, as amended.

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STATEMENT OF THE CASE

Amber Tatro is a mentally and emotionally normal[1] female child who is disabled by the birth defect of myelodysplasia, more widely known as "spina bifida" ("open spine"). Record, Trial Transcript ("Tr.") at 13-14, 95-96, and elsewhere. Amber was three and a half years old at the time of the June 19, 1979 Impartial Hearing—Record, Plaintiffs' Exhibit 5b (Tr. 137), Impartial Hearing Transcript ("I.H.Tr.") at 67—five at the time of trial, 516 F.Supp. 970; seven at the time of the Court of Appeals' second decision, 703 F.2d 825, and is now eight years old. Amber is agreed to be "orthopedically handicapped" within the meaning of 20 U.S.C. § 1401(1), 34 C.F.R. § 300.5(b)(6). Further, she was found by the Impartial Hearing Officer to be "other health impaired" within the meaning of 20 U.S.C. § 1401(1), 34 C.F.R. § 300.5(b)(7). Pl. Exh. 5, *supra*, Decision of the Hearing Officer at 6-7.

Among the effects of Amber's handicapping condition are speech impediments, mobility impairment and a "neurogenic bladder." If Amber's bladder dysfunction, which includes an inability to empty her bladder voluntarily, is left chronically unattended, it will result in "reflux" pressure on the kidneys, causing infection and kidney damage. Pl. Exh. 5b, *supra*, I. H. Tr. 14-15; Tr. 234-235, and elsewhere. To avoid the harmful consequences described, it is necessary for Amber to be "catheterized" every three to four waking hours, by a process known as "clean intermittent catheterization" ("CIC"). Pl. Exh. 5b, *supra*, I. H. Tr. 27-28, 34-37, 65-67; Tr. 111, 238-239, 244; 516 F.Supp. 971, 974. She must be catheterized at least once during the "school day"[2] in order to

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[1] It is not contested that Amber is intellectually normal, nor has the school district or anyone else on record in this case asserted that she is emotionally disordered.

[2] Petitioner asserted at trial that the Admissions, Review, and Dismissal (ARD) Committee had determined, with the parents' agreement, that a two-and-a-half-hour day program was appropriate for Amber in May of 1979. Tr. 318. However, that time limitation was not specified anywhere in Amber's individual education plan (IEP). Tr. 325. "Early Childhood Development" classes are for pre-school age handicapped children. Brief for Petitioner ("Pet. Brief") at 3. Handicapped children are eligible for

attend school safely. Pl. Exh. 5b, *supra*, I. H. Tr. 29-30; Tr. 239-240, 244-245; 516 F.Supp. 977. Amber has been provided CIC since she was thirteen months old. Tr. 79. Prior to CIC, Amber had bladder infections approximately once every two months, lasting about six weeks on one occasion. Pl. Exh. 5b, *supra*, I. H. Tr. 67. Since being on CIC, Amber has had no such infections or other injuries or side effects.[3] *Id.* at 68; Tr. 80.

"Clean intermittent catheterization" ("CIC") is a very simple, safe, quick and effective process, capable of being performed by an average layperson with minimal training, whereby a small hollow tube is inserted about one-inch into the urethra in order to drain the bladder. 516 F.Supp. 974;

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public education at age 3, while five is the age of eligibility for regular public school. 20 U.S.C. § 1412(2)(B); TEX. EDUC. CODE §§ 16.104(c)(1), 21.031. At trial, Petitioner's witness Ms. Guy conceded that Amber, then five years old, might qualify for an educational program extending from 8:30 a.m. to 2:30 p.m. Tr. 326. Subsequently, Petitioner offered Amber a two-hour-and-forty-five-minute program, attempting to schedule it between the hours in which Amber usually needs catheterization. This was the subject of special proceedings on March 13, 1981. Transcript ("Tr. (3-13-81)") at 18-20. At that time it was announced, and noted by Judge Higginbotham as a "positive sign," that Amber would go to kindergarten the following September. Tr. (3-13-81) 34. At oral arguments before the Court of Appeals on November 16, 1982, it was not disputed that Amber, then seven years old, was in a regular first grade class. She now in fact attends a regular second grade class. (Amber's current IEP is attached as an Appendix to this Brief.) There, she is entitled by law to a minimum seven-hour day. TEX. EDUC. CODE § 21.004. State Board of Education Rules for Handicapped Students provide that: "Handicapped students shall have available an instructional day commensurate with that of nonhandicapped students." 19 Tex. Adm. Code § 89.235(d), as amended to take effect August 11, 1983; 8 Texas Register 2895 (July 29, 1983) at 2922. The predecessor rule, in effect since 1979, required: "Each handicapped student will have available a six-hour instructional day as is provided all other students." 19 T.A.C. former § 89.233(b). Consequently, it is misleading to continue to describe Amber as a "pre-kindergarten student" and her "educational setting" as "the early childhood classes for two and one-half hours." Pet. Brief at 31, 33.

[3]An exception occurred when, shortly after trial, Petitioner allowed Amber to remain in school all day uncatheterized—the subject of the March 13, 1981 proceedings.

Tr. 125-126, 128-130 (testimony of Phalia Findley), 144-146 (Dr. George Williamson),[4] 235-238, 241-245, 252, 268-269 (Dr. George Hurt);[5] Joint Appendix ("J. A.") at 11a (§ 2j). CIC was pioneered in the early 1970's, to replace "sterile catheterization." J. A. 9a (§ 2f); Pl. Exh. 5b, *supra*, I. H. Tr. 15-16. "Sterile catheterization" was "prohibitive" in cost, requiring an autoclave, an expensive piece of medical equipment, and not permitting the re-use of the catheters. *Id.* at 48, 144-147; Tr. 240-241. However, it has been established that CIC is as effective as sterile catheterization and entails no greater risk of infection. Pl. Exh. 5b, *supra*, I. H. Tr. at 17, 48; Tr. 240-241. The contrasting simplicity of CIC[6] was well described by the Court of Appeals below:

> CIC is a very simple procedure which can be performed within five minutes. The catheter is washed with soap and water; the urethral area is wiped clean; the catheter is introduced approximately one and one-half inches into the urethra and the bladder contents drained; the catheter is withdrawn; and the amount of urine collected

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[4] Director of Pediatric Rehabilitation, John F. Kennedy Medical Center, Addison, New Jersey; a member of the medical faculties of Columbia University and the State University of New York; author of publications and consultant to state education agencies concerning the education of handicapped children (especially children with spina bifida); Dr. Williamson has had extensive experience with CIC. Tr. 137-142.

[5] A licensed physician, board-certified in urology, with a special interest in the neurogenic bladder; a member of the Texas Association of Genitourinary Surgeons, American and Texas Urological Associations, American Pediatric Urology Association, American Academy of Pediatric Urology (serving on the Myelodysplasia Action Committee of the latter); Dr. Hurt has served hundreds of spina bifida children, specifically in CIC. Pl. Exh. 5b, *supra*, I. H. Tr. 11-12, 17; Tr. 233.

[6] In CIC, it is not necessary to sterilize the catheter. It is sufficient to wash the catheter with soap and water and rinse it before use and to wipe it off after use. Pl. Exh. 5b, *supra*, I. H. Tr. 18-19. Gloves do not have to be used and it is not necessary to touch the part of the catheter used for the catheterization. *Id.* at 18. The bacteria introduced through CIC are of the same type that already reside in the urethral vagina anyway. *Id.* Dr. Hurt testified that of hundreds of children on CIC in his experience, none had ever suffered a perforated urethra due to catheterization, as speculated by Petitioner. *Id.* at 42.

> is measured and noted. The procedure can be taught to anyone after a training session of approximately thirty minutes, and it need not be performed by a doctor or nurse. Currently, Amber is catheterized at home by her parents, teenage sibling, and babysitter. However, when Amber is eight or nine years-old, she will be able to perform CIC upon herself.

625 F.2d 559 n.3.

A physician or nurse does not have to perform CIC—anyone can be trained to do it. Pl. Exh. 5b, *supra*, I. H. Tr. at 19. Parents are taught to catheterize their children. *Id.* at 19, 60; J. A. 11a (§ 2j). Training to do CIC requires one session of approximately 30 minutes. Pl. Exh. 5b, *supra*, I. H. Tr. 19, 29. Mrs. Tatro has trained her husband, her thirteen-year-old son, her other daughter, Amber's babysitter, and the personnel of Amber's private pre-school (including the cook), to perform CIC. *Id.* at 64-65; Tr. 78-79. (While thirty minutes is the time usually required for training, Mrs. Tatro has been able to train people in less time than that. Tr. 79.) The actual procedure takes about five minutes to perform and can be done safely and effectively with even fewer steps than the simple process outlined in the Pretrial order, J. A. 9a-10a. Tr. 81-83, 241-242, 254-255.

Most children of normal intelligence with Amber's handicap eventually learn to catheterize themselves. Pl. Exh. 5b, *supra*, I. H. Tr. 19-20; Tr. 144-146, 242-243; J. A. 11a (§ 2k). At the time of the June 1979 Impartial Hearing, approximately 400 children were receiving CIC regularly in Dallas-area school districts, by "everybody from the school nurse down to the teacher of the classroom." Pl. Exh. 5b, *supra*, I. H. Tr. 19. Dr. Hurt and Scottish Rite Hospital have helped several school districts in the area set up CIC programs. *Id.* at 28. Dr. Hurt wrote to Dr. Richard Bates, the medical consultant (and former school board member) for Irving I.S.D. (and Petitioner's chief expert witness), offering to train Irving school personnel free in the administration of CIC, but received no response. *Id.* at 29; Tr. 370. See also Tr. 241-242, 255, 283-284, 288-289.

After Amber reached three years of age in October of 1978, the Tatros met with Irving school personnel in January and April of 1979, to advise the school district of Amber's need for CIC in order to attend school when she became eligible in September of 1979. Pl. Exh. 5b, *supra*, I. H. Tr. 62-64. In May of 1979, an Admissions, Review, and Dismissal (ARD) Committee[7] met to consider an educational program and placement for Amber. Although the Committee did not disagree that CIC was necessary in order for Amber to attend school, the Committee, over the parents' objections, refused to include CIC in Amber's individualized educational program (IEP), on the grounds that the provison of CIC would be contrary to school board policy.[8] Tr. 65-66.

Pursuant to their rights under 20 U.S.C. § 1415(b)(2), Amber and her parents complained to an Impartial Hearing Officer of the failure of Irving I.S.D. to include CIC as a "related service" in Amber's IEP. Pl. Exh. 5, *supra*. The Impartial Hearing Officer ruled that Amber is entitled to CIC as a related service needed to assist her to benefit from special education, which ruling was adopted as the Decision of the State Commissioner of Education in *Amber T. bnf Mary T. v. Irving Independent School District*, Texas Education Agency Docket No. 115-SE-579 (August 6, 1979).[9] Pl.

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[7] The ARD Committee is the entity identified in Texas Education Agency rules as responsible for implementing the requirements of 34 C.F.R. §§ 300.340-300.349, 300.550-300.554.

[8] At that time, the Irving I.S.D. Director of School Health Services, a registered nurse, was not acquainted with CIC, but only with sterile catheterization, which was preferred by the hospital with which she was most familiar. Pl. Exh. 5b, *supra*, I. H. Tr. 140-147. That hospital had not revised its cathererization policies since May of 1977, although the American Academy of Pediatrics had adopted an official position in October of 1978 favoring CIC over sterile catheterization. *Id.* at 151. Compare the views expressed by Dr. Bates, who did not specialize in urology, who had not practiced medicine since 1978, and who had no patients on CIC, Pl. Exh. 5b, *supra*, I. H. Tr. 127; Tr. 368, 373; and Dr. Ware, who was not a pediatric urologist, seldom treated children, and had no experience with CIC, Pl. Exh. 5b, *supra*, I. H. Tr. 49, 60.

[9] This Court has indicated in *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982), that great weight and deference should be given

Exh. 5, *supra*. Although precluded by 20 U.S.C. § 1415(e)(1) from reviewing the decision of the Impartial Hearing Officer,[10] the State Board of Education nevertheless reversed the Commissioner and Impartial Hearing Officer and upheld Irving I.S.D.'s refusal to provide CIC to Amber Tatro.

Following the unauthorized action of the State Board of Education, the Tatros filed suit in the United States District Court for the Northern District of Texas, Dallas Division, against the State of Texas, members of the State Board of Education, the Irving Independent School District, and the Irving I.S.D. superintendent and school board, seeking, *inter alia*, preliminary and permanent injunctive relief. On December 21, 1979, Hon. Patrick Higginbotham, U. S. District Judge, entered an order denying a preliminary injunction to require Defendant (Petitioner herein) to provide CIC to Amber.[11] *Tatro v. Texas*, 481 F.Supp. 1224 (N.D. Tex. 1979). The Tatros appealed to the U. S. Court of Appeals for the Fifth Circuit.

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to the decision of the Impartial Hearing Officer. *Id.* at 3051. *Accord:* "I believe that the District Court and Court of Appeals should have given greater deference than they did to the findings of the . . . impartial hearing officer and the State's Commissioner of Education . . ." *Id.* at 3053 (Blackmun, J., concurring).

[10]*Tatro II*, *infra*, at 703 F.2d 833-834 n. 10, citing *Helms v. McDaniel*, 657 F.2d 800 (5th Cir. 1981) at 805-806 & n. 9, *cert. denied* 455 U.S. 946 (1982). Since its participation in this case, the State Board of Education has removed itself from the impartial hearing process. 6 Texas Register 4265 (November 20, 1981), amending 19 T.A.C. Chapter 157, subchapter D. Under current rules in Texas, the Impartial Hearing Officer's decision is final.

[11]In response to the request of Plaintiffs (Respondents herein) for a preliminary injunction, Judge Higginbotham, instead of receiving the record of the administrative proceedings pursuant to 20 U.S.C. § 1415(e)(2), requested stipulations of fact. When Defendant Irving I.S.D. (Petitioner herein) refused either to agree to the Tatros' proposed stipulations or to submit proposed stipulations of its own, the Plaintiff Tatros submitted their proposed stipulations by the Court's deadline. The District Court based its first decision in the case on Plaintiff's proposed stipulations. 625 F.2d 558 n. 1, 516 F.Supp. 971. The District Court's ruling was equivalent to summary judgment or granting of a motion to dismiss, holding in effect that, as a matter of law, even if the facts were as Plaintiffs alleged, Amber was not legally entitled to the relief sought for her.

Because of the confusion surrounding the proposed stipulations solicited by the District Court and submitted by Plaintiffs, the Court of Appeals had no facts before it on appeal. However, the Court held as a matter of law that CIC is a valid related service, under 20 U.S.C. § 1401 *et seq.* and 29 U.S.C. § 794, which Petitioner is required to provide to a child such as Amber Tatro, to the extent that she needs such in order to attend school so that she can benefit from special education. *Tatro v. Texas* ("*Tatro I*"), 625 F.2d 557 (5th Cir. 1980). The Court of Appeals remanded the case to the District Court to determine whether the facts of the case were as assumed by the Circuit Court, based on the proposed stipulations, and whether any other material facts not previously considered should alter the result. *Id.* at 558 n. 1. Subsequently, the parties entered into stipulations in a Pre-Trial Order, J. A. 5a, and the District Court below took evidence at trial and in subsequent evidentiary hearings, on the basis of which Judge Higginbotham made findings of fact consistent with those assumed by the Court of Appeals on the prior appeal, ordered Defendants to provide CIC to Amber Tatro, and awarded limited damages and attorneys' fees to Plaintiffs. *Tatro v. Texas*, 516 F.Supp. 968 (N.D. Tex. 1981). From the subsequently modified final order, Appendix to Petition for Writ of Certiorari ("Pet. App.") at 55a, 62a, Defendants Irving I.S.D. and the State Board of Education appealed. On April 25, 1983, the Court of Appeals rendered its second decision in the case, *Tatro v. Texas* ("*Tatro II*"), 703 F.2d 823 (5th Cir. 1983), holding that neither its prior decision nor the District Court's subsequent decision were clearly erroneous and affirming the District Court decision. After its request for rehearing *en banc* was denied, Appellant Irving Independent School District petitioned this Court for a Writ of Certiorari, which was granted December 5, 1983. (The State Defendants did not argue against CIC for Amber at trial or on appeal to the Fifth Circuit and did not join in seeking this Court's review of the Court of Appeals' decision.)

SUMMARY OF ARGUMENT

Reversal of the legal requirement that public schools provide CIC to handicapped children such as Amber Tatro inevitably will result in the exclusion and segregation of such children from a free public school education. Those spina bifida children whose parents could not find, or afford to employ, a third party to travel to school each day to provide CIC to them, would be forced either to be segregated in separate schools exclusively for handicapped children or to receive educational services at home. Either alternative would deprive the child of the benefits of interaction with non-handicapped children in the normal public school setting, and each would be costlier to the taxpayers.

CIC is a "related service" needed to assist Amber to benefit from special education in that: (1) without CIC, Amber cannot be present in any school placement to receive and benefit from specialized instruction; (2) CIC is needed to enable Amber to realize the intended benefits of instruction in an integrated regular public school setting; and (3) CIC is essential to achieving the appropriate educational goal of self-catheterization, as identified in her current IEP (attached as an Appendix to this Brief). CIC is not an excluded "medical service" as that term is used in 20 U.S.C. § 1401(17), since all the features identified to characterize CIC as "medical treatment" are equally or more typical of other expressly designated related services.

Further, CIC is a special supplementary aid or service to enable Amber to be educated in, and preclude her removal from, the regular educational environment, as required by 20 U.S.C. § 1412(5)(B). The requirement of CIC for a handicapped child such as Amber is reasonably ascertainable from the terms of the EHA, which unambiguously imposes conditions for the receipt of federal funds under the Act.

Finally, CIC is a reasonable accommodation, which does not require fundamental alterations in Petitioner's program nor impose undue financial or administrative burdens. It is needed so that Amber Tatro, an otherwise qualified handicapped individual, will not be excluded from participation

in, denied the benefits of, or subjected to discrimination by Petitioner's federally assisted program, solely on the basis of her handicap, in contravention of Section 504 of the Rehabilitation Act, as amended.

ARGUMENT AND AUTHORITY

I. DENIAL OF CLEAN INTERMITTENT CATHETERIZATION WOULD RESULT IN THE EXCLUSION AND SEGREGATION OF AMBER TATRO AND SIMILARLY SITUATED HANDICAPPED CHILDREN FROM THE FREE PUBLIC SCHOOLS.

No party to this dispute must be under any illusion as to the consequences of rescinding the legal requirement that a public school system provide CIC to children such as Amber Tatro. Inevitably, denial of CIC will result in the exclusion and segregation of such children from the free public schools. The District Courts in both the instant case and in *Tokarcik v. Forest Hills School District*, C.A. No. 79-338 (W.D. Pa. October 31, 1980), reprinted at 3 E.H.L.R. 552:429 (1980), *affirmed* 665 F.2d 443 (3rd Cir. 1981), *cert. denied sub nom. Scanlon v. Tokarcik*, 458 U.S. _____, 102 S.Ct. 3508 (1982), found as a fact that a spina bifida child such as Amber cannot safely attend public school class through the school day without the availability of CIC. 516 F.Supp. at 971, 974, 977; 3 E.H.L.R. 552:428-429. The Third and Fifth Circuit Courts of Appeals affirmed these findings as facts of the case, entitled to deference as not clearly erroneous. 703 F.2d at 825, 829, 831; *Tokarcik, supra*, 665 F.2d at 444, 446, 456. The inevitable exclusion and segregation of children such as Amber, as a consequence of the denial of CIC, is the beginning point for analysis of Amber's rights herein under both the Education of the Handicapped Act, as amended by the Education For All Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et seq.* ("EHA"), and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504").

Although at the May 1979 original ARD Committee meeting, the school district offered the Tatros no alternatives to the provision of CIC to Amber at school by school personnel, Pl. Exh. 5b, *supra*, I. H. Tr. 69; Tr. 109, Petitioner

since has offered Amber and her family three options, each of which would result in exclusion and segregation of many handicapped children from public school.

First, Petitioner has proposed that the Tatros find and hire a third party to go into the classroom during the day and provide the CIC service to Amber. Pl. Exh. 5b, *supra*, I. H. Tr. 130; Tr. 86-87, 104-111. The expense to the family would not be trivial. Because the times at which the service is needed by Amber might vary somewhat from one day to the next—Pl. Exh. 5b, *supra*, I. H. Tr. 34, 37, 66; Tr. 92—the parents' agent, to be available when needed, might have to remain on call (and thus at parents' expense) throughout much or most of each school day—not just for the five or ten minutes per day needed for the catheterization itself. Both of Amber's parents work during the day, so neither of them could go to Amber's school each day to catheterize her. Pl. Exh. 5b, *supra*, I. H. Tr. 63; Tr. 72-73. (In *Tokarcik*, *supra*, a member of the child's family had to go to school each day to provide the service. 665 F.2d 445.) Another mother proposed by the school district as one who could do the job in fact was not available. Tr. 86-87. The Tatros' high school age son had no means of getting from his school to Amber's each day. Tr. 105. Amber's babysitter was not willing to go to school to do the job. Tr. 104-105, 110-111. And the cost of a visiting nurse was prohibitive ($33 per visit, twice a day). Tr. 106.

Even if, in fact, the Tatros were able to find and afford someone to provide the service, such a requirement still would offend the EHA and Section 504. If administration of CIC must depend upon the parents' ability to find and afford the services of a non-school-district employee, the right of handicapped children such as Amber to be educated in public school will become contingent upon factors having nothing to do with either their legal entitlement to public school education or their ability to benefit from the individualized program in public school (once provided safe access to it). The children of those parents fortunate (and in some cases, persistent) enough to find and employ a private provider of CIC during school hours will be able to attend

public school with "normal" children. Those not so fortunate will be excluded.

Congress, however, clearly mandated by its passage of the Education of the Handicapped Act that the right of handicapped children to be educated in the public schools was no longer to be dependent upon the parents' ability privately to accommodate the child's handicap-related access needs. Congress expressly identified, as one of the evils the EHA was enacted to correct, the following situation:

> [B]ecause of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

20 U.S.C. § 1400(b)(6). It makes no sense to imagine that Congress would seek to achieve that objective through passage of the Act and at the same time contemplate that parents such as the Tatros would be responsible for such services as CIC. As will be discussed further in section V-C below, CIC is closely analogous to assistance by school personnel for children who, due to their handicaps, cannnot eat independently, or cannot toilet independently, or cannot dress independently. Surely, the EHA and Section 504 would not sanction the requirement that parents be responsible for sending a person at their expense to school, to spoon feed their child, to help their child to the bathroom, or to help their child take off and put on her coat.[12]

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[12] In one of the earliest cases arising under the EHA and Section 504, the school district offered a spina bifida child of normal intelligence three options: (1) "homebound instruction," (2) placement in a segregated school for the handicapped only, or (3) "that the child could be enrolled at [a regular public school] if her mother would go to school two or three times a day to attend to the child." The court found all three alternatives unacceptable. The child's mother in fact was unable to go to school during the day. "The requirement of the plaintiff mother's intermittent presence at [the] School as a condition to her child's being permitted to attend [regular public] school, coupled with the impossibility of this request upon the plaintiff [mother] constituted an exclusion of the plaintiff child from [public] School. Further, even if the mother's presence were circumstantially feasible, the right of the child to attend school cannot be legally

The second alternative for Amber, if CIC is withheld from her by the school district, is to be placed in a separate school for the handicapped, at Petitioner's expense. 703 F.2d 829; *cf. Tokarcik*, *supra*, at 665 F.2d 446. Petitioner's chief expert witness, the school district's medical consultant and former school board trustee, testified:

> Well, of course, the obvious [alternative] would be a contracting basis. That she would be contracted out to some other agency, that was able to handle this [CIC] function.

Pl. Exh. 5b, *supra*, I. H. Tr. 128. In its Brief, Petitioner declares that because of Amber's inability to attend public school safely without CIC, "an alternative placement must be selected." Pet. Brief at 33. In that event, Petitioner would be responsible for the cost of such a placement (except for the negligible cost of the CIC, if Petitioner's other arguments prevail). 20 U.S.C. § 1413(a)(4); 34 C.F.R. §§ 104.33(b)(3), 300.302. The willingness of Petitioner even to suggest the second option, necessarily implying a contract placement in a private school for the handicapped, belies its putative concern with cost and "undue burden." The fact is that the Tatros have not been able to find a non-public school for the handicapped in the Dallas area for which Amber (who is neither mentally retarded nor emotionally disturbed) would be eligible. Tr. 72. If a school could be found anywhere at all, it likely would be so far from home as to require residential placement. Ironically, *Amicus* National School Board Association has complained extensively about the high cost of residential and other contract placements of handicapped students.[13]

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conditioned upon the mother's presence at school." *Hairston v. Drosick*, 423 F.Supp. 180 (S.D.W.Va. 1976) at 182-183.

[13] "In general, non-residential [non-public] placement doubles the cost of educating a handicapped pupil. Residential placements cost about four times as much as educating in the school district or if placed in relation to the cost of educating a non-handicapped student, it cost eight times as much to educate a handicapped student in a residential setting as a non-handicapped student in a school district." NATIONAL SCHOOL BOARDS ASSOCIATION, A SURVEY OF SPECIAL EDUCATION

Petitioner's third option is for Amber to be educated at home—what Texas Education Agency rules refer to as "homebound" placement, in which instructional and related service personnel would go to the Tatro residence to serve Amber there. 19 Tex. Adm. Code § 89.242(b)(6); Pl. Exh. 5b, *supra*, I. H. Tr. 128; 703 F.2d 829; *Tokarcik*, *supra*, at 665 F.2d 446. The third alternative, like the second, also is not cost-effective. Petitioner has agreed in the IEP that an appropriate education for Amber requires the services of a teacher, a physical therapist, an occupational therapist, and a speech therapist. To enable Amber to receive via a "homebound" program the amount of educational benefit intended by her IEP—much less the seven hours per day promised to her by state law and regulation, TEX. EDUC. CODE § 21.004, 19 T.A.C. § 89.235(d)—it would be necessary for Petitioner to divert at least four valuable professionals from availability to other children, for several hours a week, to work one-to-one with Amber. Such an allocation of personnel resources does not square well with *Amicus* NSBA's professed concern about the public school's dearth of qualified personnel needed to comply with the EHA. NSBA Brief at 31-34. And it would deprive Amber of the many educational benefits of integration with non-handicapped children.

The second alternative—contract placement—would segregate Amber from her non-handicapped peers (in age and intellect), while the third course—homebound placement—would isolate her from other children altogether. Beyond their costliness and of more importance legally, all three options violate the EHA's "mainstreaming preference," *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982) at 3049. A major purpose behind the passage of both Section 504 and the amended EHA was to insure maximum feasible access to and participation in regular public school classes by handicapped children.

> The time has come when we can no longer tolerate the invisibility of the handicapped in America. I am talk-

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COSTS IN LOCAL SCHOOL DISTRICTS (1979) at 26 (attached as an Appendix to the *amicus curiae* brief of the Texas Association of School Boards before the Court of Appeals).

ing about over 1 million American children who are excluded from school. . . . [T]oo often we keep children, whom we regard as "different" or a "disturbing influence," out of our schools and community activities altogether, rather than help them develop their abilities in special classes and programs. . . . Where is the cost effectiveness in consigning them to . . . "terminal" care in an institution? . . . Every child—gifted, normal, and handicapped—has a fundamental right to educational opportunity. . . . But more than 1 million children are denied entry into public schools, even to participate in special classes. . . . We do not even have adequate statistical information on the great number of *physically handicapped children who have the mental ability to attend school but are denied that right.* The variety of explanations for this denial include problems of transportation and architectural barriers. But *the injustice of exclusion remains.*

118 Cong. Rec. 525 (January 20, 1972, remarks of Sen. Humphrey, principal author of the bill which ultimately became Section 504) (emphasis added).

> For far too long handicapped children have been denied access to the regular school system because of an inability to climb the steps to the schoolhouse door, and not for any other reason. This has led to segregated classes for those children with physical handicaps. This is an isolation that in many cases is unnecessary.

121 Cong. Rec. 19483, 19484 (June 18, 1975, remarks of Sen. Stafford—one of the principal co-authors of the bill that was enacted as the Education For All Handicapped Children Act, as well as the ranking minority member of the committee which drafted the legislation).

> Lastly, I would like to mention the concept of mainstreaming children, that is, the placing of handicapped children in the least restrictive environment. . . . I do not believe the burden of proof should be upon that administrator or teacher who seeks to permit the handi-

> capped child to remain in a normal classroom with his peers. Rather, I believe the burden of proof in terms of effectiveness of a program ought to rest with that administrator or teacher who seeks to remove a child from a normal classroom, to segregate him or her from non-handicapped children.

Id. at 25539, 25540 (Rep. Miller). See also *id.* at 19503 (Sen. Cranston), 19505 (Sen. Humphrey), 23709 (Rep. Biaggi), 37026 (Rep. Quie), 37030 (Rep. Daniels), 37412 (Sen. Stafford), 37419 (Sen. Cranston). The Congressional purpose is echoed in federal court decisions interpreting the EHA. *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983) at 1063, *cert. denied sub nom. Cincinnati City School Dist. Bd. of Educ. v. Roncker*, ____ U.S. ____, 52 U.S.L.W. 3266 (No. 82-1890, October 3, 1983); *Springdale School Dist. v. Grace*, 693 F.2d 41 (8th Cir. 1982) at 43, *cert. denied* ____ U.S. ____, 103 S.Ct. 2086 (1983); *Tokarcik v. Forest Hills School Dist.*, *supra*, at 665 F.2d 455; *Campbell v. Talledega County Bd. of Educ.*, 518 F.Supp. 47 (N.D. Ala. 1981) at 55; *Espino v. Besteiro*, 520 F.Supp. 905 (S.D. Tex. 1981) at 911-913, *denial of planitiffs' attorneys' fees rev. and rem.* 708 F.2d 1002 (5th Cir. 1983).

It follows from the foregoing that children such as Amber Tatro should not be excluded or segregated from the regular public school program without the most compelling of educational justifications. Yet, clearly, the denial of the simple service of CIC will have precisely the exclusionary, segregating effect which Congress sought through Section 504 and the EHA to preclude. Not only would that result be detrimental to Amber's education, but (ironically) it would increase the financial burden of the public school system.

II. CLEAN INTERMITTENT CATHERIZATION IS A RELATED SERVICE WITHIN THE MEANING OF THE EDUCATION OF THE HANDICAPPED ACT.

A. Clean intermittent catherization is needed to assist Amber Tatro to benefit from special education.

The Education of the Handicapped Act is a program of cooperative federalism designed to assist states and local

school districts in providing education programs to handicapped children. A state which elects to receive money under the EHA must provide to each of its school-aged handicapped children, *inter alia*, a "free appropriate public education." 20 U.S.C. § 1412(1). Local educational agencies, such as Petitioner, have parallel obligations. 20 U.S.C. § 1414(a)(1)(C)(ii). A "free appropriate public education" is defined in pertinent part as "special education and related services." § 1401(18). Each of these terms is then further defined. Special education is "specially designed instruction . . . to meet the unique needs of a handicapped child," § 1401(16), while related services are:

> transportation, and such developmental, corrective, and other *supportive services* (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) *as may be required to assist a handicapped child to benefit from special education*, and includes the early identification and assessment of handicapping conditions in children.

20 U.S.C. § 1401(17) (emphasis added).

The District Court and the Court of Appeals below held that, for Amber, CIC is a valid related service which the Petitioner must provide so that she can attend school and benefit from the special education program offered there. The District and Circuit Courts in the instant case and in *Tokarcik v. Forest Hills School District*, *supra*, found as a fact that, due to factors relating to the handicap, a spina bifida child such as Amber cannot safely attend and participate in the educational program offered in a public school classroom without the provision of CIC. Wherever she happens to be placed for her education, Amber, because of her handicap, cannot safely remain through the school day and partake of the instruction presented during that time without receiving CIC at least once and usually twice. A special education program which Amber cannot be present to receive cannot be of any "benefit" to her. "Quite simply put, without the

provision of CIC, Amber cannot benefit from the special education to which she is entitled, for, without CIC, she cannot be present in the classroom at all." *Tatro I, supra*, at 625 F.2d 562.

In *Board of Education v. Rowley, supra*, this Court concluded that the purpose and intent of the EHA is first "to make public education available to handicapped children" and next "to make such access [to public education] meaningful." *Id.* at 3037. Consequently:

> The statutory definition of "free appropriate public education," in addition to requiring that the State provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a child *to benefit* from special education." § 1401(17) (emphasis added).

Id. at 3048 (emphasis supplied in the opinion). See also *id.* at 3041, 3042, 3046, 3049.

Clearly, for a child such as Amber, questions of "access" and "placement" cannot be arbitrarily distinguished from "benefit," as suggested by *Amicus* NSBA on its Brief at 20-21. Amber cannot benefit from a program to which she does not have meaningful (safe) access. A "related service," as stressed by this Court in the references above, is one which is needed to assist the child to *benefit* from special education. The above-cited passages also emphasize "educational benefit" as the determining factor for an "appropriate education." In that same opinion, this Court further recognized that "appropriateness" (i.e., educational benefit) often is linked to placement. To the statement that "an 'appropriate education' is provided when personalized educational services are provided," the decision attached a footnote explaining:

> The use of "appropriate" in the language of the Act, although by no means definitive, suggests that *Congress used the word as much to describe the settings in which handicapped children should be educated as to prescribe the substantive content or supportive services of their education.* For example, § 1412(5) requires that handi-

> capped children be educated in classrooms with non-handicapped children "to the maximum extent appropriate." . . . In addition, the definition of "free appropriate public education" itself states that instruction given handicapped children should be at an "appropriate preschool, elementary, or secondary school" level. §1401(18)(C).

Id. at 3046 n. 21 (emphasis added). Educationally, for Amber a regular public elementary school is the appropriate setting, suitable for her participation. Educational services would not be appropriately "personalized" for her unless delivered in that setting.

As the discussion in Part I, *supra*, makes clear, Congress and a majority of courts addressing the question have recognized that the "benefits" of specialized instruction in a public school setting include not only the instruction itself but the benefits of the least restrictive environment. For those handicapped children educationally able to benefit from the instruction therein, placement in an integrated public school environment offers the benefits of, *inter alia*, interaction with non-handicapped children, role models for socially appropriate behavior, and avoidance of the stigma associated with separate special placement. These benefits contribute substantially to the handicapped child's future independence and productivity in society (within the limits otherwise imposed by his/her handicap), which was recognized by this court as an important aspect of "educational benefit." *Board of Education v. Rowley*, *supra*, at 3048 n. 23, and legislative history recited therein.[14]

It follows from the foregoing that for a child who is intellectually and emotionally capable of being educated in or near the "mainstream," specialized instruction which is offered in a setting other than a regular public school classroom

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[14] In addition to the passages cited in *Rowley*, *supra*, see also 121 Cong. Rec. 19494 (June 18, 1975, remarks of Sen. Javits), 19504 (Sen. Mondale), 19505 (Sen. Beal), 23702, 23703 (July 21, Rep. Brademas), 23709 (Reps. Biaggi, Minish), 25538, 25539 (July 29, Rep. Harris), 37411 (November 19, Sen. Humphrey), 37417 (Sen. Javits), 37418 (Sen. Biden), 37419 (Sen. Beall).

would deprive the child of important educational benefits. Thus, for a child such as Amber, specialized instruction in a segregated setting does not confer the benefit of the very same instruction in an integrated environment. In *Roncker v. Walter*, *supra*, and *Springdale School Dist. v. Grace*, *supra*, the Courts of Appeals held that the educational benefits of merely adequate instruction in an integrated public school setting outweigh the benefits of a *superior* academic program in a segregated environment. CIC is needed specifically to permit a child such as Amber to be placed in a regular public school classroom, rather than a separate facility exclusively for the handicapped. Thus, in this further sense, CIC is a service needed by Amber, on account of her handicap, to assist her to benefit from special education—i.e., to "benefit" from the specialized instruction in the sense of being able to receive it in the educationally beneficial integrated classroom, which is the least restrictive environment appropriate to Amber's educational needs and abilities. Specifically regarding spina bifida childen, see *Tokarcik v. Forest Hills School Dist.*, *supra*, at 665 F.2d 455-456; *Hairston v. Drosick*, 423 F.Supp. 180 (S.D.W.Va. 1976) at 183.

In addition to its related service "access" role, CIC also has special instructional value for Amber. Since 90-95% of spina bifida children learn to self-catheterize eventually—Pl. Exh. 5b, *supra*, I. H. Tr. 20; Tr. 243—and since self-catheterization is obviously an important self-help skill, which will enhance the child's independence in society, learning to self-catheterize is an essential goal of an appropriate education for a child such as Amber. D. Stauffer, *Catheterization—A Health Procedure Schools Must Be Prepared to Provide*, 54 JOURNAL OF SCHOOL HEALTH 37 (1984) at 38. In reality, it is a form of toilet-training (an essential area of instruction for many handicapped children), since for a child with Amber's disability, CIC substitutes for normal voluntary urination. The first IEP developed for Amber in May of 1979 noted her "spina bifida" under "Special Alert" and her inability to toilet herself under "Self-Care Skills." Pl. Exh. 5b, *supra*, I. H. Tr. 135. Amber's current IEP, attached to this Brief as an Appendix, shows that Petitioner

and Respondent have agreed that the ability to self-catheterize is an appropriate educational goal for Amber. *Id.*, Addendum to O.T. Goals, following p. 6. It defies reason to suggest that having Irving school personnel perform CIC with Amber could be in no way related to, nor needed to assist Amber to benefit from, the IEP goal of self-catheterization.[15] CIC thus unquestionably is "required because [it has] a direct relationship to the education of the child . . . as a teaching tool." NSBA Brief at 14.[16]

B. Clean intermittent catheterization is not an excluded "medical service" within the meaning of the Education of the Handicapped Act.

The EHA excludes from the ambit of "related services" any "medical services" other than those "for diagnostic and evaluation purposes." 20 U.S.C. § 1401(17). Consistent with the language and purpose of the EHA, the Court of Appeals below carefully circumscribed the scope of public school responsibility for "life support" services such as CIC—as did the Third Circuit in *Tokarcik*, *supra*—so as to insure that requiring CIC for a child such as Amber would not lead to the inclusion of services Congress did not intend. *Tatro I* at 625 F.2d 562-563; *Tatro II* at 703 F.2d 827-831.

To discern the boundary between included "related services" and excluded "medical services," so as to locate CIC with respect thereto, the Court of Appeals below was guided, first, by the interpretation of the U. S. Department of H.E.W.

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[15] In *Tokarcik v. Forest Hills School District*, *supra*, the District Court was persuaded that assisting Amber to achieve the skill of self-catheterization fit within the federal definition of occupational therapy under the EHA at 34 C.F.R. § 300.13(b)(5): "Improving, developing or restoring functions impaired or lost through illness [or] injury. . . . Improving ability to perform tasks for independent functioning when functions are impaired or lost. . . . Preventing . . . further impairment or loss of function." 3 E.H.L.R. 552:429-430; 665 F.2d 458-459.

[16] Consequently, even if the decision below is held to be erroneous, which Respondents emphatically do not concede, this Court should do no more than remand for further factual findings as to Amber's IEP. However, since the reasoning of the Court of Appeals is correct, further expenditure of scarce judicial resources on this case should not be required.

(now Education), the federal executive department charged with promulgating the regulations to implement and enforce the EHA. 20 U.S.C. § 1417(b). As such, the Office (now Department) of Education's initial interpretation of the statute is entitled to great weight and deference.[17]

The Department defined the term "medical services" as used in the EHA to mean the "services provided by a licensed physician" (permitting only those provided to "determine a child's medically related handicapping conditions which results in the child's need for special education and related services"). 34 C.F.R. § 300.13(b)(4). The Fifth Circuit found this definition to impose an important limitation on the requirement of "life support" services such as CIC as "related services" under the EHA. *Tatro I* at 625 F.2d 562-563. The Third Circuit noted that "the regulations themselves place realistic limitations on the nature of the school services to be provided under the EAHCA," so that "the drastic medical services . . . which the school authorities fear they will by asked to furnish in the future are by definition excluded." *Tokarcik v. Forest Hills School District, supra,* at 665 F.2d 456. Since the direct non-diagnostic/non-evaluative services of the physician, which are excluded, are the most expensive on the continuum of medical costs, this limitation operates to insulate Petitioner and the NSBA, TASB school official *amici* from the largest part of the costs they purport to fear.

A second line between permissible related services and excluded "medical services" was discerned by the Fifth Circuit from the essential purpose of related services, i.e. to assist the handicapped child to benefit from special education. It follows that a "life support" service would not be a "related service" under the EHA if it is not needed by the child in order to be present in the educationally appropriate least restrictive placement throughout the school day. Thus,

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[17] *Lau v. Nichols*, 414 U.S. 563 (1974) at 569-570, cited with approval by the majority opinion in *Guardians Ass'n. v. Civil Service Comm'n*, ___ U.S. ___, 103 S.Ct. 3221 (1983) at 3226-3227; *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). *Cf. Consolidated Rail Corp. v. La Strange*, ___ U.S. ___, 52 U.S.L.W. 4301 (No. 82-862, February 28, 1984) at 4304.

if the child could safely remain in the educationally appropriate setting throughout the school day without receiving the service, and then receive the service outside of the school setting and school hours, the school district would not be responsible for the procedure as a "related service." *Tatro I* at 625 F.2d 563. This important feature, drawn from the words of the Act itself, serves to remove even more physician-prescribed services from the category of those for which a school district might become responsible under the EHA. Note that Amber's handicap also results in dysfunction of the bowels, requiring periodic enemas. However, since these only are needed twice a week, and can be performed at night, by Mrs. Tatro at home, Respondents do not need to seek this service in order for Amber to be educated in public school. Tr. 97-99.

Third, in order to be a related service, the life support service must be one which a nurse or other qualified person can perform. 34 C.F.R. § 300.13(b)(10). *Tatro I* at 625 F.2d 563. The *amicus curiae* brief of the Texas Medical Association and Dallas Medical Society, at the District Court level, attached as an Appendix to Judge Higginbotham's decision, indicated that CIC could be provided "by nurses, school teachers, *or others* . . ." 516 F.Supp. 989 (emphasis added).

> In the case of CIC, the technical aspects of the procedure are not complicated and can be performed successfuly by children on themselves after appropriate training (boys by age 8 and girls by age 10). . . . CIC appears to be a procedure which can be safely performed while neither a physician or nurse is present. CIC can be done safely when a patient or other person is trained to perform it properly and is taught to recognize conditions which should be brought to the physician's attention.

Id. at 990. A service such as CIC which can be performed safely and effectively, with minimal training, by an average lay person, an ordinary parent, or an elementary school age handicapped child, clearly fits within the array of permissible "related services" and is not an excluded "medical service" that must be provided by a licensed physician.

Further analysis shows that CIC could not be an excluded medical service, because it is so closely analogous to other related services which are expressly listed.[18] Even though CIC seems medical in that it requires a physician's prescription, so does fitting a hearing aid,[19] 34 C.F.R. § 300.13(b)(1)(vi), and physical therapy.[20] In fact, Petitioner Irving I.S.D.'s own policies authorize a school nurse to dispense oral medications and administer emergency injections, two procedures requiring physician prescriptions.[21] Pl. Exh. 2 (Tr. 38).

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[18]The list of services in § 1401(17) is illustrative but not exhaustive. 34 C.F.R. § 300.13 *Comment; Tokarcik v. Forest Hills School District*, *supra*, at 665 F.2d 457. As noted above, "related services" are those services which are "required to assist a handicapped child to benefit from special education." 20 U.S.C. § 1401(17). "The term 'special education' means specially designed instruction . . . to meet the *unique needs* of a handicapped child," through an "*individualized* education program." 20 U.S.C. § 1401(16), -(18), -(19) (emphasis added). Congress did not purport to predict all of the special services that would be needed to assist in meeting the unique educational needs of eight million handicapped children on an individual basis. The task would have been staggering and would not have left room for inclusion of future technological innovations which could introduce services not known to Congress in 1975. Thus, it is only reasonable to conclude that Congress sought to describe and illustrate the types of services to be included, rather than to specify every particular service. This Court has described the list in § 1401(17) as "Examples." *Board of Education v. Rowley*, *supra*, at 3041 n. 10. Consequently, the U. S. Department of Education (formerly Health, Education and Welfare) did not abuse its discretion when it expanded the list of "related services" to include "school health services" and when it further commented that even its extended list was "not exhaustive." 34 C.F.R. § 300.13(b)(10) & *Comment*.

[19]For example: D.C. CODE ANN. § 28-4005(a)(9)(B); MINN. STAT. ANN. §§ 145.43, 145.44; WIS. STAT. ANN. § 459-035.

[20]For example: ALA. CODE § 34-24-217; ALASKA STAT. § 08.84.160; ARK. STAT. ANN. § 72-1328(b); D.C. CODE ANN. § 28-4001(4)*(5); GA. CODE ANN. § 43-33-18(1); KAN. STAT. ANN. §§ 65-2901, 65-2914; KY. REV. STAT. § 327-010; ME. REV. STAT. ANN. tit. 32 § 3002; N.H. REV. STAT. ANN. § 328-A:9; N.Y. EDUC. LAW § 6531; OHIO REV. CODE ANN. § 4755.48(F); OR. REV. STAT. § 688.130-140; PA. STAT. ANN. tit. 63 § 1309; VA. CODE §§ 54-273(9), 54-281-2.

[21]*Amicus* Texas Association of School Boards acknowledges in its Brief at 6 that "dispensing medication prescribed by doctors" is among "those services routinely provided by school nurses."

Similarly, CIC seems "medical" in that it must be "supervised" by a physician but it requires no more supervision than does the listed related service of physical therapy. The physician need not be physically present to supervise the service (516 F.Supp. at 975-976, 990); may monitor the service indirectly through examination of the child outside of school hours; and may monitor through periodic reports from the school and/or parents. CIC also appears to promote a medical objective (in addition to its educationally-related benefits) in that it "treats" Amber's neurogenic bladder. But by the same token, physical therapy[22] fulfills a medical treatment goal of preventing atrophy of muscle tissue; audiology might include the goal of prevention of hearing loss, 34 C.F.R. § 300.13(b)(1)(iii), (iv); and counseling services might treat a neurosis or prevent the development of a more acute disorder. 34 C.F.R. § 300.5(b)(8).

Nothing in law, logic, medicine or education decrees that the same service cannot be both medically and educationally beneficial at the same time. A service which performs an education-related function does not become an excluded medical service simply because it happens to play a "medical" role as well.

Finally, because CIC itself obviously does not entail much cost or burden, Petitioner and the school board *amici* have sought to have it excluded not on its own merits but on the

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[22]The former state implementing rule on physical therapy as a related service, on which Petitioner sought to rely in arguments to the Court of Appeals, Petitioner's Reply Brief at 14-17 (5th Cir.), described physical therapy as "the art and science of evaluation, program planning, *and implementation* of physical or corrective conditions resulting from birth, illness, or injury." 19 T.A.C. former § 89.235(a)(3)(C)(x) (emphasis added). The rule went on to describe the therapy as including "therapeutic exercise programs designed to *develop or restore neuro-muscular and/or sensorimotor function, relieve pain, control postural deviations, minimize disabilities*, and to maintain maximal performance levels within the individual's capabilities." *Id.* (emphasis added). The present Texas Education Agency rules make no attempt to elaborate physical therapy beyond the federal regulations' definition of it as "services provided by a qualified physical therapist." 34 C.F.R. § 300.13(b)(7); 19 T.A.C. §§ 89.215(b)(10), 89.217.

basis of other costly and burdensome medical treatment obligations to which they speculate it might lead. Petitioner asserts that the effect of the lower Court's decision would be to obligate public school systems to assume "the massive financial obligations involved in providing *all* medical treatment physicians may unilaterally choose to prescribe for the more than eight (8) million children with handicapping conditions." Pet. Brief at 22 (emphasis added). In keeping with that dramatic misrepresentation, Petitioner and *Amici* NSBA and Texas Association of School Boards offer a "shotgun" barrage of "medical treatments" they allege to be analogous to CIC and thus required by the *Tatro* decisions. These "treatments" are offered either with no discussion at all or with only very superficial comment as how and why they compare with CIC. Pet. Brief at 10; NSBA Brief at 32-33; TASB Brief at 6. Most of the alleged analogs to CIC were mentioned for the first time in briefs after the close of the evidentiary record. Given the simplicity, safety, and inexpensiveness of CIC; its necessity to assist Amber to benefit from special education; and the previously discussed guidelines by the Court of Appeals below, it should not be the burden of Respondents to examine and distinguish each of the "treatments"[23] to which Petitioner and the school

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[23]The absurdity of Petitioner's and the school board *amici*'s attempted analogies is well illustrated by their comparing CIC to kidney dialysis (more accurately, kidney hemodialysis). Petition for Writ of Certiorari at 9; Pet. Brief at 10 n. 3; NSBA Brief at 33. Kidney hemodialysis (in which the body's entire blood supply is drained, cleansed, and returned to the body) cannot be offered at school but must be provided at special dialysis centers, usually staffed by physicians on the premises for close-at-hand monitoring. The procedure takes 5-6 hours each time, up to three times a week. Thus, hemodialysis is not a service needed for access to instruction in a public school class; rather, it necessarily removes the child from school for long periods of time. Hemodialysis includes an extraordinarily high risk of injury and detrimental side effects, and is only employed with children when certain death is the alternative. Hemodialysis is not a skill for independent living which the child can be expected to learn to do for herself eventually. Extraordinarily expensive specialized medical equipment is required for hemodialysis and the personnel who administer the procedure must receive extensive specialized medical training. Many other features serve to distinguish a treatment such as hemodialysis from CIC

board *amici* imagine CIC will lead. Further, Respondents are reluctant to gratuitously concede the inclusion or exclusion of other services prior to other plaintiffs' and defendants' having the chance to make their respective cases. Each service advanced should be examined on its own merits, in light of the criteria previously discussed. Whatever the outcome with respect to other hypothesized procedures, CIC cannot reasonably be excluded for a child such as Amber Tatro.

III. CLEAN INTERMITTENT CATHETERIZATION IS A SUPPLEMENTARY AID OR SERVICE WITHIN THE MEANING OF THE EDUCATION OF THE HANDICAPPED ACT.

In addition to its related service role, clean intermittent catheterization also is required for Amber as a "supplementary aid [or] service." Section 612 of the EHA requires the State to:

> . . . assure that, *to the maximum extent appropriate*, handicapped children . . . are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of *supplementary aids and services* cannot be achieved satisfactorily . . .

20 U.S.C. § 1412(5)(B) (emphasis added). The Act then goes on to make local educational agencies such as Petitioner responsible for:

> . . . *to the maximum extent practicable* and consistent with the provisions of section 1412(5)(B) of this title,

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and to place dialysis clearly outside the range of services contemplated by the EHA and the Court of Appeals decision below. See J. LUCKMAN & R. SORENSEN, MEDICAL-SURGICAL NURSING (1980), a widely used text in nursing schools, as well as A. GUYTON, TEXTBOOK OF MEDICAL PHYSIOLOGY (1980); L. WHALEY & D. WONG, NURSING CARE OF INFANTS AND CHILDREN (1983) at 1146-1152, 1174-1180; and T. Nevins and S. Mayer, *Dialysis*, in S. GELLIS & B. KAGAN (eds.), CURRENT PEDIATRIC THERAPY (1980).

> the provision of *special services to enable such children to participate in regular educational programs* . . .

20 U.S.C. § 1414(a)(1)(C)(iv) (emphasis added). Since Amber is *educationally* equipped to benefit from instruction in regular public school class, then § 1412(5)(B) and its corollary § 1414(a)(1)(C) require Petitioner to offer the special service which will enable Amber to be placed and remain in that environment.

Unlike "isolated" or "scattered" references in the legislative history that were found insufficient by this Court in *Board of Education v. Rowley, supra*, at 3047, 3049 (concerning "maximum potential" and "equal educational opportunity" under the EHA); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) at 411 n. 11 (with respect to "affirmative action" under Section 504); and *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) at 20 (regarding equal protection as a basis for 42 U.S.C. § 6010), insistence that school districts extend the special services necessary to integrate handicapped children into regular classes is a consistent theme which runs throughout the legislative history of the EHA, as amended. See the legislative history surveyed in Part I above. Prior to the "related services" requirement, which was added to the EHA by Public Law 94-142, the Education For All Handicapped Children Act of 1975,[24] the "supplementary aids and services" requirement was part of P.L. 93-380, the Education of the Handicapped Amendments of 1974. 20 U.S.C. former § 1413(a)(13)(B). The earliest judicial interpretation of the amended EHA applied the 1974 "supplementary aids and services" requirement to the provision of services necessary to enable a girl disabled by Amber's handicap of spina bifida (including incontinence of the bowels) to attend regular public school classes:

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[24] P.L. 91-230, the original Education of the Handicapped Act of 1971, authorized funding to "initiate, expand, or improve programs and projects . . . which are designed to meet the special educational *and related needs* of handicapped children . . ." 20 U.S.C. former § 1413 (emphasis added).

> This educational fact that handicapped children should be excluded from the regular classroom situation only as a last resort is recognized in federal law. The federal statute providing moneys to states for special education programs mandates that every state have procedures to assure handicapped children are educated with children who are not handicapped and that "removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1413(a)(13)(B).

Hairston v. Drosick, *supra*, at 183-184. Petitioner and the school board *amici* stress that Amber is able to "benefit *educationally*" from the individualized program offered by Petitioner. Pet. Brief at 31-32; NSBA Brief at 7-8; TASB Brief at 11-12. It is precisely because Amber can "benefit *educationally*" from instruction in the regular public school that she should be provided the service which will permit her access to that program in the regular school environment. Amber is entitled to be educated in the least restrictive placement appropriate to her individual *educational* needs and abilities.

> Not only have we guaranteed [handicapped children] a right to education, but I think we have written adequate provisions which will protect those rights and guarantee that *a child will not be* improperly labeled or *placed in an educational setting which will not suit his or her educational needs.*

121 Cong. Rec. 37026 (November 18, 1975, remarks of Rep. Quie) (emphasis added). Petitioner has acknowledged, as it must, that "where a child has average or above-average intelligence, the goal of the school system may be to enable the child to go from one grade to another and graduate with an average level of success," citing *Rowley*, *supra*, at 3049. Pet. Brief at 30. The NSBA *Amicus* Brief stresses the importance Congress assigned to enabling handicapped children to participate in physical education classes and extra-

curricular activities, *id.* at 12-14, options that will be foreclosed to Amber if she must remain at home because CIC is not available at school.

If Amber were not *educationally* capable of benefitting from any program that could be offered in a public school setting, even with supplementary aids and services, then it would be permissible to educate Amber in a non-public segregated (by handicap) setting, such as a residential placement. *Abrahamson v. Hershman*, 701 F.2d 223 (1st Cir. 1983) at 226-230, relying upon *Board of Education v. Rowley, supra.* Amber's neurogenic bladder does not render her *educationally* incapable of benefitting from instruction in a regular public school setting. In fact, it is agreed that Amber is intellectually and emotionally normal. (Even most mentally and emotionally disabled children are educated in or near the "mainstream.") Rather, Amber's neurogenic bladder renders her *physically* incapable of being educated alongside children who are not handicapped, *without the supplementary aid or service of CIC.* The distinction is significant. To justify placement of Amber outside the regular educational environment, Petitioner must be able to show that Amber needs a type of instruction which can only be offered in a separate facility. Some handicapped children require such separation on account of their unique educational needs. But once it is established that the type of instruction Amber needs is the kind which can be presented in an integrated regular public school environment, Petitioner must make available the ancillary services necessary to enable Amber to receive such instruction in that setting.

IV. THE REQUIREMENT OF CLEAN INTERMITTENT CATHETERIZATION AS A RELATED OR SUPPLEMENTARY SERVICE FOR A HANDICAPPED CHILD SUCH AS AMBER TATRO IS A REASONABLE CONDITION IMPOSED ON PETITIONER FOR THE RECEIPT OF FEDERAL FUNDS UNDER THE EDUCATION OF THE HANDICAPPED ACT.

It is clear from the foregoing sections that because Amber needs CIC in order to avoid exclusion and segregation from

public school, the EHA gives her a right to that service. Nevertheless, Petitioner asserts that:

> Any rights created by § 1415, enforceable against the Petitioner, are limited to a showing Petitioner has violated the "State Plan." This [Respondents] did not attempt to do. Without a finding that the local educational agency has violated the provisions of the "State Plan" as required by § 1413, any "relief may well be limited to enjoining the federal government from providing funds to the [State]."

Pet. Brief at 18, relying on *Pennhurst State School & Hospital v. Halderman*, *supra*. However, this Court has already disposed of the foregoing contention in *Board of Education v. Rowley*, *supra*, which prescribes a two-fold inquiry for judicial review in EHA cases:

> First, has the State complied with the procedures set forth in the Act?[27] And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

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[27]This inquiry will require a court *not only to satisfy itself that the State has adopted the State plan, policies and assurances required by the Act*, but also to determine that the State has created an IEP for the child in question which conforms with the requirements of § 1401 (19).

Board of Education v. Rowley, *supra*, at 3051 (emphasis added). Clearly the inquiry under each prong of the *Rowley* test looks beyond the mere question of whether the local district's array of services aligns with the State Plan.[28] Whatever might be contained in the Texas State Plan and whatever might be the political decision of the Department

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[28]The petitioner in *Rowley* argued that since sign language interpreter services were not listed in the New York State Plan, Hendrick Hudson school district was not obligated to provide them. *Board of Education v. Rowley*, *supra*, Pet. Brief, reprinted at 3 E.H.L.R. 553:323 (1982) at 337-349. This Court did not ground its decision on that basis, nor did it exclude sign language interpreter services under every conceivable circumstance in New York.

of Education as to whether to approve the State Plan, a Court still must determine whether the individual program offered Amber is reasonably calculated to enable her to benefit educationally. For the reasons discussed in Parts I-III, *supra*, that program, taken as a whole, does not, due to its crucial omission of CIC.

Petitioner next argues that if the EHA mandates CIC for Amber, then Congress exceeded its authority under this Court's reasoning in *Pennhurst State School & Hospital v. Halderman*, *supra*. In that decision, this Court held that:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State *voluntarily and knowingly accepts the terms* of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions *or is unable to ascertain* what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Id. at 17 (emphasis added, citations omitted). A comparison of the EHA with the statute examined in *Pennhurst*, the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6001 *et seq.* (the "DD Act"), will show that the State of Texas, and, through it, its political subdivisions such as Petitioner, voluntarily and knowingly accepted the terms of the EHA, which unambiguously imposed conditions from which the State reasonably could ascertain an obligation such as CIC for a child such as Amber.

To be more precise, the *Pennhurst* case dealt with one section of the DD Act, § 6010. This Court concluded that § 6010 did not confer on plaintiffs any substantive rights whereby they could compel the State of Pennsylvania to undertake the costly and burdensome task of upgrading its public in-

stitutions for the mentally retarded and substituting one mode of treatment (small community-based group homes) for that state's present method of services through large isolated institutions. *First*, this Court found that section 6010 did not by its terms impose conditions for the receipt of federal funds under the DD Act. The Court stressed that whereas §§ 6005, 6009, 6011, 6012, 6063 and 6067 of the DD Act clearly state "conditions" which a state must meet in order to receive funding under the Act, § 6010 is expressed in terms of Congressional "findings." *Pennhurst*, *supra*, at 13-14, 22-23. By contrast, 20 U.S.C. §§ 1412-1415 clearly state conditions for the receipt of federal funds under the EHA as amended. A state could not ascertain from the language of § 6010 that the rights enumerated therein were enforceable conditions for that state's receipt of DD Act funding. However, a state could have no doubt that the requirements of EHA §§ 612-615, 20 U.S.C. § 1412-1415, were conditions of EHA Part B funding. Thus Congress spoke with a clear voice, unambiguously imposing conditions for the grant of EHA moneys.

Second, this Court judged the Act's requirements, and the specificity thereof, in relation to the amount of money appropriated by Congress to implement the legislation and the burden and expense of the requirements to be imposed. The Court noted that under the DD Act, Pennsylvania received only $1.6 million in 1976. "When Congress does impose affirmative obligations, it usually makes a far more substantial contribution to defray costs." *Pennhurst*, *supra*, at 24. By contrast, the federal government spends over a billion dollars per year under the EHA as amended. Texas' share alone of the Fiscal Year 1984 EHA Part B appropriation ($67.6 million) exceeds DD Act funding for the entire nation ($62.1 million). P.L. 98-139. In comparing the EHA to the DD Act in light of the *Pennhurst* decision, it must be remembered that while the *Pennhurst* plaintiffs sought a massive, costly systemic overhaul, Respondents herein seek only a service of minimal cost and burden, if any.

Finally, the State could ascertain from the Act as a whole, in context, what might be expected of it. By listing such ser-

vices as physical therapy, audiology, psychological services, etc. in § 1401(17). Congress gave fair notice to the states that the EHA would require school districts to provide types of services not traditionally offered in the public schools. By emphasizing "individualized" services to meet each handicapped child's "unique needs," § 1401(16)-(19), Congress indicated that the list of services in subsection (17) was not—indeed, could not be—exhaustive. Any doubt as to that point should have vanished when the implementing federal regulations expanded the illustrative list and expressly declared that even the expanded list was not exhaustive. 34 C.F.R. § 300.13 and *Comment*. From all the foregoing, it is clearly ascertainable from the EHA, and thus Texas voluntarily and knowingly accepted as terms of its "contract," that a child such as Amber Tatro would be entitled to a physician-prescribed supportive service which, though not specified by name in the Act, is needed to enable her to attend public school and participate without undue risk to her health in the regular educational environment.

V. CLEAN INTERMITTENT CATHETERIZATION IS A REASONABLE ACCOMMODATION PURSUANT TO SECTION 504 OF THE REHABILITATION ACT.

A. Section 504 of the Rehabilitation Act is applicable to the instant case.

Section 504 of the Rehabilitation Act of 1973, as amended, requires in relevant part that:

> No otherwise qualified handicapped individual in the United States, as defined in [29 U.S.C. § 706(7)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

29 U.S.C. § 794. The question of whether handicapped plaintiffs have a private right of action to enforce Section 504 (Pet. Brief at 38) was disposed of by this Court in *Consolidated Rail Corp. v. LaStrange, supra. Cf. Cannon v. University of Chicago*, 441 U.S. 677 (1979) (recognizing a private right of

action under the analogous Title IX of the 1972 Education Amendments, 20 U.S.C. § 1681 *et seq.*); *Guardians Ass'n v. Civil Service Comm'n*, *supra*, at 3227-3228 (private right of action under Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d).

As to the assertion that the EHA "preempts" Section 504 in this case (Pet. Brief at 37-38), this Court has granted *certiorari* on the principal decision relied upon by Petitioner for that proposition. *Smith v. Cumberland School Committee*, 703 F.2d 4 (1st Cir. 1983), *cert. granted sub nom. Smith v. Robinson*, ____ U.S. ____, 52 U.S.L.W. 3342 (No. 82-2120, October 31, 1983). Thus, the Court probably will resolve the pre-emption question prior to deciding the instant case. Respondents will not presume to add here to the arguments already presented to the Court in *Smith*, *supra*, as to why the EHA does not pre-empt Section 504—especially since the analysis in other sections of this Brief is necessarily lengthy. Instead, Respondents respectfully commend to the Court the arguments and authorities presented in the *Smith v. Robinson* Brief of Petitioners and Brief of *Amici Curiae* Association for Retarded Citizens, Advocacy, Inc., *et al.* *Cf. Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) at 459-460, and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) at 47-49 (42 U.S.C. § 2000e does not pre-empt 42 U.S.C. § 1981 with respect to employment discrimination); *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409 (1968) (42 U.S.C. § 3601 *et seq.* does not pre-empt 42 U.S.C. § 1982 with regard to housing discrimination).

It is the position of Respondents that Section 504 is applicable to the present case and that Petitioner has violated that statute. Respondents have established a violation of Amber's rights under the foregoing statute by showing that (1) Amber is an "otherwise qualified handicapped individual" with respect to Petitioner's public school program; (2) the public school program to which Amber seeks continued access is a program receiving federal financial assistance; and (3) Amber has been excluded from participation in, denied the benefits of, and subjected to discrimination by Petitioner's public school program (and would be again if Peti-

tioner prevails) solely on the basis of her handicap.[26] The District Court below found as a fact, which the Court of Appeals affirmed, that the public educational program in question receives federal financial assistance. 516 F.Supp. 977 n. 17; Pet. App. 60a-61a; 703 F.2d 832. The District Court cannot be said to have so clearly abused its discretion as to be held clearly erroneous. Rule 52(a), Fed. R. Civ. Pro.; *United States v. Gypsum Co.*, 333 U.S. 364 (1948) at 395. Consequently, the inquiry next turns to the remaining elements of a Section 504 violation.

B. Amber Tatro is otherwise qualified to receive a free appropriate public education in the least restrictive environment.

In *Southeastern Community College v. Davis*, *supra*, this Court illuminated the parameters of the term "otherwise qualified" as used in Section 504. In that decision, the Court held that Francis Davis, a deaf applicant, was not "otherwise qualified" for admission to a college's professional nurse training program. *Id.* at 414. Two critical distinctions between that case and the instant one must be examined in order to determine the application of *Davis* to Amber Tatro.

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[26]The U. S. Department of Education Office of Civil Rights (OCR), the executive agency charged with administrative enforcement of Section 504, found in September of 1979 that Petitioner had violated Amber's rights under Section 504 by withholding CIC. Pl. Exh. 3 (Tr. 42). That ruling was in line with the consistent position of OCR. *North Kansas City (Mo.) School District*, 3 E.H.L.R. 257:04 (November 29, 1978). *Cf. Consolidated Rail Corp. v. LaStrange*, *supra*, at 4304 (the Department of HEW § 504 regulations "particularly merit deference") & n. 15 ("In adopting § 505(a)(2) in the amendments of 1978, Congress incorporated the substance of the Department's regulations into the statute"). Those incorporated regulations require Petitioner to provide "related aids and services that (i) are designed to meet individual educational needs ofhandicapped persons as adequately as the needs of non-handicapped persons are met;" to "provide for the education of each qualified handicapped person . . . with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person;" and to "place a handicapped person in the regular educational environment . . . unless it is demonstrated . . . that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. §§ 104.33(b)(1), 104.34.

To be a "qualified handicapped person" under U.S. Department of Education regulations governing post-secondary educational and vocational programs, the applicant must "meet[ ] the academic and technical standards requisite to admission or participation in the recipient's education program . . ." 34 C.F.R. § 104.3(k)(3), cited with approval in *Davis, supra*, at 406 (previously codified as 45 C.F.R. § 84.3(k)(3)). By contrast, to be "otherwise qualified" for purposes of a public pre-school, elementary, or secondary program, the handicapped child need only be within the proper age range.[17] 34 C.F.R. § 104.3(k)(2).

In the *Davis* case, this Court found as a fact that, due to her deafness, Francis Davis could not be trained to perform some of the essential elements of nursing. *Southeastern Community College v. Davis, supra*, at 401-404, 409-410, 413. Thus, she could not meet the academic/technical requirements for participation in the professional nurse training program (which ultimately amount to the ability to be trained to serve as a professional nurse). Amber Tatro, by contrast, is not required to meet any academic or technical standards in order to be otherwise qualified for a free appropriate public education. It is sufficient that she is a handicapped child between the ages of 3 and 21 inclusive and a legal resident of the Irving Independent School District. Southeastern Community College was not required to undertake "affirmative action" in order to prevent the exclusion of a handicapped applicant not otherwise qualified; nor was it compelled to fundamentally alter its program in order to render it one for which the not otherwise qualified handicapped person could qualify. Since Amber meets the essential elements of eligibility—no academic/technical requirements can render her not "otherwise qualified" for a free appropriate public education at the pre-school/elementary/secondary level—Amber has the right to ask for more in the way of accommodation, to insure that she is not denied benefits and excluded from participation, than did Francis Davis at the post-secondary level.

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[17] Further, the child must reside "in the recipient's jurisdiction." 34 C.F.R. § 104.33(a) and Appendix A *Comment* 23.

A second distinction, found persuasive by the Fifth, Tenth, and Eleventh Circuits, leads to the same result. As previously noted, in *Southeastern Community College v. Davis, supra*, this Court accepted the lower court's factual finding that Ms. Davis' deafness would prevent her from ever being able to perform certain essential tasks of nursing. Thus, even with reasonable accommodations, Ms. Davis still could not realize the principal benefit of the program to which she sought access—i.e., to be trained to fulfill the role of professional nurse. *Id.* at 401-402, 409-410. By contrast, in the instant case, the simple modification necessary to enable Amber's safe participation (CIC) would not prevent her from realizing the benefits of specialized instruction in public school. *Tatro I, supra*, at 564; *Tatro II, supra*, at 832. *Accord New Mexico Ass'n for Retarded Citizens v. New Mexico*, 678 F.2d 847 (10th Cir. 1982) at 853-854; *Georgia Ass'n for Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983) at 1580. *Cf. Shirey v. Devine*, 670 F.2d 1188 (D.C. Cir. 1982) at 1201-1202 n. 36. Petitioner has acknowledged that Amber is *educationally* capable of benefitting from the instruction offered in its public school program. Assuming that the program offered Amber is otherwise appropriate by this analysis, but for the contested omission of CIC, the question of whether Amber could benefit from that program if given access to it is foreclosed. Amber thus is presumptively an otherwise qualified handicapped individual.

C. Petitioner's refusal of clean intermittent catheterization to Amber Tatro would have the effect of excluding her from participation in, denying her the benefits of, and subjecting her to discrimination by, Petitioner's program solely on the basis of her handicap.

To be permitted access to Petitioner's program, Amber requires a small accommodation of her bodily elimination needs. A more reasonable accommodation for a handicapped person hardly could be imagined than CIC. It takes only a few minutes twice a day, can be provided safely and easily, does not entail costly or elaborate equipment, and requires neither highly specialized credentials nor extraordinary training for the person providing the service. This

Court held in *Southeastern Community College v. Davis*, *supra*:

> We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. *Technological advances can be expected to enhance opportunities to rehabilitate the handicapped* or otherwise to qualify them for some useful employment. *Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State.* Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. *Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.*

Id. at 412-413 (emphasis added). As discussed in the Statement of the Case, *supra*, CIC represents a technological advance which replaced the expensive and burdensome sterile catheteriation and which allows the needs of handicapped children such as Amber to be accommodated without undue financial and administrative burdens on either the State of Texas or Petitioner. In the exercise of its continuing important responsibility, the Office for Civil Rights of the Department of HEW and of its successor Department of Education has consistently identified the refusal to provide CIC as an instance of discrimination under Section 504. See footnotes 26, *supra* and 28, *infra*.

Prior to the passage of Section 504 and the 1975 EHA amendments, many school systems across the nation, on the basis of state law or local practice, excluded non-toilet-trained handicapped children from their free public schools. A. Abeson, *et al.*, *Access to Opportunity*, in 2 HOBBS (ed.),

ISSUES IN THE CLASSIFICATION OF CHILDREN 270 (1975) at 272. Since the enactment of Section 504 and the EHA, that exclusion has been discontinued. Obviously, states have been willing to assume that a handicapped child must not be excluded from participation in or denied the benefits of the public schools solely on the basis of her handicap-related inability to toilet appropriately. Consequently, it should come as no surprise now to find public school personnel assisting handicapped children with their toileting needs, including physically placing a child on and removing her from the commode.[28] A child reasonably cannot be expected to remain in school through a six-to-eight hour school day without relieving her bladder or bowels. If, due to physical or mental disability, the child is unable to perform this natural function independently, a reasonable accommodation, in order that her education might proceed, is for school personnel to assist the child. Due to her orthopedic/other-health-impairment, Amber Tatro is unable to empty her bladder independently. A reasonable accommodation, so that Amber may remain in the most integrated setting in which she is educationally capable of benefitting, is for school personnel to assist twice a day through CIC to drain her bladder. If the Court of Appeals decision in this case is reversed, the clock may be turned back to the time when public school systems could exclude children who, solely on account of their handicaps, lacked independent toileting skills.

Similarly, a child cannot be expected to attend school all day without eating. Some handicapped children, although able to benefit educationally from instruction (standardized or personalized) in public school, are unable, due to a physical or mental handicap, to eat independently. Such children re-

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[28] In a recent decision, the U. S. Department of Education's Office of Civil Rights found a school district in non-compliance with Section 504 for "[f]ailing to provide related aids and services . . . necessary for [the child] to receive an appropriate education," because the district failed to implement a two-hour restroom schedule to accommodate the child's handicap-related bladder problems. *Kansas City U.S.D. # 50*, OCR Ref. No. 07831094, reprinted at E.H.L.R. Curr. Dec. 257:455 (May 2, 1983).

quire the reasonable accommodation of being spoon fed by school personnel. Some handicapped children, although able to benefit educationally from instruction in public school, are unable, for example due to paralysis of the hands and arms, to dress and undress. Such a child could not be expected to remain in school throughout the school day without removing and putting back on items of clothing, such as coat and hat, and may need reasonable accommodation in the form of assistance from school personnel in taking off and putting on their coats, hats, etc.

All of the foregoing examples have legally relevant aspects in common with CIC for Amber. CIC is comparable to the accommodations discussed above in terms of cost, risk, and physical involvement. In each case, including CIC, a child educationally capable of benefitting from instruction in public school would be excluded from participation in and denied the benefits of the public school program without the service as a reasonable accommodation.

A key benefit of the educational program offered to non-handicapped eight-year-olds is second-grade-level academic and other instruction[29] in a regular second grade class in a regular public elementary school. However, without the accommodation of CIC, Amber's educational program would have to be offered to her in a setting outside the public school system. (See discussion in Part I above.) This significant deviation in no way renders the program *educationally* appropriate. *Educationally*, instruction in a regular public school classroom is appropriate for Amber. It is suited to her unique *educational* needs and abilities, and benefits her educationally. Consequently, Petitioner cannot legally justify the substantial departure from the norm which it proposes for Amber's educational program—i.e., instruction outside the

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[29]Amber's instructional program has had to be supplemented by physical, occupational, and speech therapy, and modified somewhat to compensate for learning difficulties secondary to the neurological damage of spina bifida, in order to be educationally appropriate. In all other respects, it is a regular second grade curriculum. See the IEP attached as an Appendix hereto.

public school. The basis for the deviation is not educational. Amber's age and residence qualify her for a free appropriate public education in the least restrictive environment appropriate to her *educational* needs and abilities. In the absence of CIC, Amber's "need" for separation from the public school mainstream arises not from her *educational* needs and abilities (as, for example, in the case of *Abrahamson v. Hershman, supra*) but solely from Petitioner's refusal to accommodate her handicap. "The exclusion of a minimally handicapped child from a regular public classroom situation without a bona fide educational reason is in violation of . . . 29 U.S.C. § 794." *Hairston v. Drosick, supra*, at 184.

Clearly then, Petitioner has discriminated against an otherwise qualified handicapped individual solely on the basis of her handicap—by withholding from Amber the reasonable accommodation she needs, solely on account of her handicap, in order to participate in and benefit from the educational program for which she is otherwise qualified. In yet one other respect, Petitioner has discriminated against Amber under classical discrimination analysis. Petitioner makes available to non-handicapped regular students the services of its school nurses, to administer physician-prescribed medications, orally or in emergencies by injection. Pl. Exh. 2, *supra*. Throughout the public school systems, school nurses routinely dispense medications prescribed by medical doctors. Brief for *Amicus* TASB at 6. School nurses also provide first aid. *Id.* Thus, Petitioner makes available to students who do not have Amber's unique handicap those physician-prescribed services which are within the competence of a school nurse and which are needed by the children in order to attend school safely throughout the school day. However, Petitioner seeks to withhold from Amber the simple physician-prescribed service of CIC, which is well within the competence of a school nurse and which is needed by Amber, solely on the basis of her handicap, to attend public school safely through the school day.

D. Clean intermittent catherization for Amber Tatro does not impose an undue burden on Petitioner.

In *Southeastern Community College v. Davis, supra*, this Court identified two forms of "undue burden" which would relieve a recipient of responsibility for accommodating a handicapped person: "fundamental alteration in the nature of a program" and undue financial and administrative costs. *Id.* at 410, 412. To accommodate Francis Davis, the college nursing training program would have had to eliminate practical training in those essential tasks of nursing which Ms. Davis could never perform (and thus never demonstrate competency in) due to her handicap. Consequently, the recipient could not accommodate the handicapped plaintiff without rendering its program in essence something other than a professional nursing training program. "It is undisputed that respondent could not participate in Southeastern's nursing program unless the standards were substantially lowered." *Id.* at 413. By contrast, Amber does not seek the removal of any requirement which is relevant to her eligibility to receive a free appropriate public education. The *de facto* "requirement" that she be able to remain in class all day without catheterization has *nothing* to do with her age, legal residence, or *educational* needs and abilities. Independent toileting skill is not a criterion for public school eligibility and the lack of it does not "otherwise disqualify" Amber, whereas the requirements imposed on Francis Davis had very much to do with her academic/technical qualifications for admission to a post-secondary educational program.

Further, and more important, the addition of CIC to the total array of services offered by Irving I.S.D. to meet the unique needs of its handicapped students will not transform that school district into something it is not already. Petitioner already is, as it is required by the EHA to be, an agency which offers the physician-prescribed and physician-monitored services of physical therapy, audiology, and school health services. It is already a system which includes the medically-related (though not strictly "medical" within the meaning of the EHA) services of occupational therapy, speech pathology, psychological counseling, and social work services. It is ludicrous to imagine that the addition of CIC tips the scales to Petitioner's becoming a public health

system.[10] Requiring Petitioner to provide the simple, inexpensive, and safe accommodation of CIC does not legally or logically obligate Petitioner in the future to offer such elaborate medical treatment as kidney dialysis to some other child as a "reasonable accommodation." The same factors discussed in section II-B above, which propel kidney dialysis and other falsely analogized treatments outside the scope of "related services," would also serve to preclude such treatment as a "reasonable accommodation."

By use of the qualifier "undue," this Court signalled in *Davis* that not every financial and/or administrative burden is impermissible in order to accommodate a handicapped person. Consequently, the question of "undue burden" is a factual determination, which the trial court obviously resolved in Respondents' favor in the instant case. In *Davis*, the burden was found to be "undue" because even after extensive modifications in order to render the program one for which Ms. Davis could qualify despite her handicap, Ms. Davis still could not realize the intended benefit of the program. By contrast, Amber, who is already otherwise qualified, could realize the intended benefit of a public school education if provided reasonable accommodation to permit her access to it. The intended benefit of a handicapped elementary school student's special education program differs significantly from the intended benefit of a post-secondary professional training program. The intended benefit of the latter is to achieve a particular result—i.e., to be trained to perform the essential tasks of the profession in question. *Southeastern Community College v. Davis*, *supra*, at 413. However, as this Court has observed, the intended benefit of a free appropriate public education at the

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[10] For handicapped and non-handicapped children alike, the public schools perform the incidental role of "public babysitter" or "day care" program, enabling both parents to be employed full time. The fact that the public school system happens to perform this secondary function does not convert it from a primarily educational to primarily custodial system. Comparably, the fact that a reasonable accommodation such as CIC, to enable a handicapped child such as Amber to be educated in public school, also serves a health-related purpose, does not transform the school district into a health care institution.

pre-school/elementary/secondary level is not necessarily to produce a particular outcome, but simply to enable the child to receive educational benefits. *Board of Education v. Rowley, supra*, at 3043. With the accommodation of CIC to permit Amber to remain safely in the public school classroom, she can benefit educationally from the instruction offered there.

The financial and administrative "costs" of CIC cannot be considered undue. None of the courts examining CIC has been persuaded as a fact that this simple service entails much cost at all. Since the level of training required to administer the service is minimal, a school district need not hire new staff to provide the CIC, unless it chooses to for reasons of its own. The cost in terms of staff time (perhaps ten minutes per school day) is negligible. The amount of time that would have to be spent in consultation with the prescribing physician is well within tolerable limits—no more so than responsible school personnel would spend for children with other medically-related handicap needs, e.g., for physical therapy, audiology, etc. Finally, to the extent that the prescribing/delegating physician provides diagnostic or evaluation services in connection with the child's CIC, the school district would be financially responsible.[31] 20 U.S.C. § 1401(17); 34 C.F.R. § 300.13(b)(4).

Petitioner virtually concedes that CIC itself is not burdensome, by placing such heavy reliance on arguments as to the dire impositions to which upholding CIC might lead. By this reasoning, Amber must be denied the service she needs in order to be able to remain in class through the day, not because serving Amber would burden the district but because someday some other child might ask for something that really is burdensome. However, the legal standards for related (as opposed to purely medical) services and for reasonable accommodation, as thoroughly examined above, provide

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[31]Note than four of the seven physician functions in CIC that are listed in Pet. Brief at 25-26 are diagnostic and evaluative in nature: (1), (4), (5), (7). Respondents have not asked that Petitioner either pay for or hire the physician to perform any of the physician functions.

more than adequate safeguards for the public school system against the future horrors feared by Petitioner.

To create the illusion of cost, Petitioner and the school board *amici* argue that provision of CIC will increase the risk of injury and thus necessitate higher liability insurance premiums for the school district. Two points render this argument invalid. In the first instance, as previously discussed, the record shows that CIC is a very safe procedure, with minimum risk. More importantly, Congress has removed increased risk as a basis for excluding handicapped children from public school. Opening the public schoolhouse doors to previously barred children in wheelchairs, with diminished intelligence, with impaired judgment, with deficient motor coordination, with fragile bodies, with damaged senses, etc., cannot help but increase the overall risk of accident or injury. Nevertheless, the EHA's and Section 504's command is unmistakable: to include *all* handicapped children, in the regular public school environment to the maximum extent such children can benefit educationally therefrom. The focus is on the needs and abilities of the children rather than on school officials' fears of liability. Congress has made the judgment that the benefit to society of appropriately educating handicapped children for independence and productivity outweighs any increased burden on local school systems of serving previously excluded handicapped children.

Conclusion

In consideration of all the foregoing, Respondents respectfully pray that this Court affirm the decision of the U. S. Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,

James C. Todd
ADVOCACY, INCORPORATED
1006 East 50th Street
Austin, Texas 78751
(512) 475-5543
Attorney for Respondents

3 Yr. Eval. due: 11/83 Page 1 of 21

IRVING INDEPENDENT SCHOOL DISTRICT
ADMISSION, REVIEW, AND DISMISSAL COMMITTEE SUMMARY

STUDENT Amber Tatro DATE August 26, 1983

D.O.B. 10/9/75 SCHOOL J. Haley PROGRAM Resource

I. The committee reviewed the following data:

A. Assessment reports (specify reports and dates)
___ No additional information provided
__X__ Assessment information presented as documented:
4/10/82, 7/22/82, 3/4/83 Neurosurgery note/Frederick Sklar, M.D.
4/21/83 Report/Scottish Rite Hospital
5/17/83 Examination Report/Everett A. Moody, M.D.

B. Assessment data or information from the parent or student:
___ No additional information provided
__X__ Assessment information presented as documented:
Mrs. Tatro gave a verbal report of Amber's recent progress including visit. Request for information form was signed at this meeting.

C. Assessment data or information from other school personnel:
___ No additional information provided
__X__ Assessment information presented as documented:
Adapted Physical Education Report 8/11/83/C Shaffer
Mr. Brown gave a verbal progress report of Amber's 6th grade year. Mr. Parker gave a verbal progress report of remedial German language.

II. The Committee, after considering all of the above assessment data, decided that the student:
___ did not meet any specific eligibility criteria at this time.
__X__ met the specific eligibility criteria for Orthopedically Handicapped (Handicapping Condition)

SE-83-143

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III. The committee decided that this student:
✓ needs special education services because of the handicapping condition(s) cited above.
____ does not need special education services at this time.

The data on which this decision was based include assessment as documented:
Previous medical reports indicating Orthopedic handicap, intellectual assessment indicating needs in academic areas.

IV. The committee ensures that this student is not assigned to special education on the basis of criteria which were developed solely on the command of the English language. ✓ Yes ____ No

The committee ensures that this student was not placed in special education if the only deficiencies identified are directly attributable to:
A. a different cultural lifestyle ✓ Yes ____ No
B. lack of educational opportunities ✓ Yes ____ No
C. lack of achievement from previous education experiences ✓ Yes ____ No

Discussion:
Amber falls within the norm for peers and school population.

V. Annual Review

A. Long-range goals and short-term objectives as indicated by the documented progress of the student are considered ✓ appropriate ____ inappropriate

B. The program placement as it relates to student progress is ✓ appropriate ____ inappropriate

C. The related services, if any, are ✓ appropriate ____ inappropriate

D. Referral for additional assessment is considered ____ necessary ✓ unnecessary

E. A change in the student's program placement is ____ needed ✓ not needed (See deliberations)

F. IEP developed or modified with new goals and objectives. (as appropriate).

INDIVIDUAL EDUCATIONAL PLAN

A. Present competencies (may reference State III assessment data attached)

1. Academic/developmental
Woodcock Johnson Test Scores 5/12/83
Reading - 1.5 grade level
Math - 1.6 " "
Written Language Achievement Test 5/12/83
Spelling - 1.4 "
According to Mrs. Boone, Amber is functioning as an average first grader.

2. Physical
See occupational & physical therapy reports of August, 1983.

3. Behavioral
Amber has a short attention Span. Amber is willing to work in the school setting. Amber gets along well with her peers.

4. Prevocational/vocational (age 14+) N/A due to Amber's age.

B. Instructional and related services goals and objectives:

(Written language goals and objectives of occupational therapist will be a result independently of OT and regarding Amber. See occupational therapy report of August, 1983.)

Goal: Amber will complete Handwriting requirements with 75% accuracy, copying from the chalkboard by 2nd grade paper.

Objective #1: Formation of letters on 2nd grade paper, with 75% accuracy.

Criteria for evaluation: Teacher - made tests, CLASS tests, etc.
Schedule for evaluation: quarterly
Implementor: Resource teacher, occupational therapist

Objective #2: Amber will improve in placement of letters on a given line.

Criteria for evaluation: Teacher - made tests, CLASS tests, etc.
Schedule for evaluation: quarterly
Implementor: resource teacher, occupational therapist

SI-83-144

Goal: Amber will progress toward a mid 2nd grade level in math skills.

Objective #1: Amber will be able to add 2 subtract fractions to eighths with 80% accuracy.

Criteria for evaluation: Teacher made tests, class objectives, etc.
Schedule for evaluation: quarterly
Implementor: Resource Teacher

Objective #2: Amber will be able to count amounts of money up to twenty-five cents.

Criteria for evaluation: Teacher made tests, class tests, etc.
Schedule for evaluation: quarterly
Implementor: Resource Teacher

Objective #3: Amber will be able to add and subtract two digit numbers without regrouping.

Criteria for evaluation: Teacher made tests, class tests, etc.
Schedule for evaluation: quarterly
Implementor: Resource Teacher

Goal: See occupational therapists report for suggestions on the appropriate goals and objectives. (August 1983)

Objective #1:

Criteria for evaluation:
Schedule for evaluation:
Implementor:

Objective #2:

Criteria for evaluation:
Schedule for evaluation:
Implementor:

Objective #3:

Criteria for evaluation:
Schedule for evaluation:
Implementor:

IEP SERVICES

C.

Services	Time	Start	End	Modifications
Regular Education				
Regular Second grade	R/S of day	8/30	6/84	Using 2nd grade goals
	@ 324-9th [illegible] day			
Special Education				
Resource w/ Mom transport	15-30 min/day	9/83	8/84	Shorter lessons more
Resource Math	45 min day			individual help
Vocational Education				
IHH does in homemaking	N/A			N/A
Related Services				
✓ Occupational Therapy	[illegible]	8/83	6/84	See IEP
✓ Physical Therapy	45 min 1 time a week			
✓ Adaptive Physical Education	consultation basis	9/83	6/84	See IEP
✓ CIC (See Prescription Dr. [illegible] 7-6-83)	2 times a day	8/83	6/84	N/A
✓ Speech/Language Therapy	Evaluation within a 30 min day			N/A
✓ Transportation				
____ None	N/A	9/83	6/84	
____ Special Ed. Bus				
____ Lift Bus				
✓ Parent Reimbursed				
____ Other				

For visually handicapped, autistic, or contract students, the committee has completed and attached additional IEP requirements. N/A Yes ____ No

For the student in 8th grade or age 14 as of September 1, the committee has completed and attached a graduation plan. N/A Yes ____ No

8-6-81

Dr. John Townley
Irving Independent School District
901 O'Connor Road
Irving, Texas

Re: C.I.C. Instructions for Amber Leigh Tatro
PRESCRIPTION

Dear Sir:

Amber Tatro has been placed on a schedule of Clean Intermittent Catheterization every three to four hours during the waking day. Amber is to be catheterized at the times listed:

6:30 A.M.
9:30 A.M.
12:30 P.M.
3:30 P.M.
6:30 P.M.
9:30 P.M.

If Amber's diaper is wet at the time for the scheduled catheterization, this should be reported to me, Dr. Frosts, or Dr. Goldstein at the Spina Bifida Clinic at the Schottish Rite Hospital as the above schedule may need to be modified.

A qualified school nurse or other qualified person can perform C.I.C. and attached to these instructions are the Scottish Rite Hospital instructions for catheterization of a female which are to be followed.

A # 10 or # 12 catheter should be used to start out.

The above schedule for catheterization and size of catheter may be altered upon the direction of myself, Dr. Frosts, or Dr. Goldstein from time to time according to Amber's needs.

If there are any questions, I, Dr. Frosts, or Dr. Goldstein may be reached through the Spina Bifida Clinic at Scottish Rite Hospital.

M. D.

date

1983 84 school year.

Long-Range

To increase fine motor skills in accordance with school curriculum.

Implementation:

OT/PT/Parent: 1. Client will remove shoes, socks + braces independently - within 5 min.

OT/PT/Parent: 2. Client will put on shoes, socks + braces with minimal assist within 10 min.

OT/Parent: 3. Client will remove and put on shoes + socks within 10 min.

OT/Special Teacher: 4. Client will write letters between lines using appropriate grade level paper 75% accuracy.

OT/Classroom Teacher: 5. Client will use 3 point grasp on pencils and crayons without reminders for correct finger placement.

OT: 6. Coordinate self-catheterization program with nurse, if appropriate. Specific goals to be formulated

For Foley Table Re Cath

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TEXAS SCOTTISH RITE HOSPITAL FOR CRIPPLED CHILDREN

INSTRUCTIONS FOR PARENTS ON CATHETERIZATION OF FEMALE

Purpose:

To completely empty the bladder at scheduled intervals in order to decrease the incidence of urinary tract infection.

Urine that stays stagnant in the bladder is more likely to become infected. A bladder that stays full becomes enlarged and thickened.

Scheduled emptying of the bladder allows the patient to become familiar with the difference in the sensation of a full bladder and an empty bladder.

Equipment Needed:

Clean catheter, metal or rubber. (Metal is best since it can be boiled repeatedly without deterioration.)

Soap and water.

Dish to catch the urine, for example, a re-usable jar.

Large underpad, to prevent soaking bed linens.

General Instructions:

1. Wash hands with soap and water.
2. Get all of the equipment ready.
3. Get child ready. (If possible, put at table height since it is easier to do this procedure at this height.) Place child on her back.
4. Spread labia apart with one hand and wash genitalia with soap and water with the other hand, always moving in a downward direction. (Never wash in an upward direction since this will move germs from around the rectum up into the area of the bladder opening.)
5. Insert catheter in urethra and let all urine drain out of the bladder. This may take longer than you think, so do not remove catheter until the urine has stopped draining.
6. If you are unable to catheterize, contact your local Public Health Nurse or call Texas Scottish Rite Hospital.
7. Discard urine.
8. Clean catheter. Clean with soap and warm water after each use. Allow to dry and place in a clean, dry envelope.

   At least once a day after the catheter has been washed with soap and water place it in a pot of water and boil for 20 minutes. Allow the catheter to air dry and place it in a clean dry envelope.

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OPHTHALMOLOGY CONSULTANTS, P.A.
EVERETT A. MOODY, M.D.
PEDIATRIC OPHTHALMOLOGY AND STRABISMUS
[illegible] A. SHIRLEY, M.D.
GENERAL OPHTHALMOLOGY

DISEASES AND SURGERY OF THE EYE

EXAMINATION REPORT

Patient's Name: Amber Tatro
Date of Examination: 5-17-83

I. Diagnosis: Strabismic amblyopia

II. Treatment:

A. ✓ Glasses
B. _____ Patching
C. _____ Medications
D. _____ Exercises
E. _____ Surgery
F. _____ None

III. Recommendations for school:

A. _____ Front of class placement
B. _____ Needs visual aids
C. _____ Needs special materials
D. _____ Visual restrictions
E. ✓ None of the above
F. _____ Other

IV. Patient is to return: One year

V. Comments: With glasses visual acuity corrected to 20/20+ two eye. Good visual function & coordination noted.

EVERETT A. MOODY, M.D.

[illegible] SUITE 800 [illegible] (214) 750-8888
[illegible] SUITE 210 [illegible] (214) 659-8888

X

7-6-21

TEXAS SCOTTISH E HOSPITAL
FOR CRIPPLED CHILDREN
2222 Welborn
Dallas, Texas
214:521-3168

Report of Clinic Visit/Return

TO: [illegible]

In response to your request, the following information is provided to you as a summary of the patient's last visit.

Patient's Name [illegible] DOB [illegible]

Clinic [illegible] Date [illegible]

Chief Complaint/Diagnosis Status post humerus fx [illegible]

Interval History [illegible] (new referral) [illegible]

Recommendations [illegible]

Return to Clinic [illegible]

[illegible]
Medical Records Department

ADDITIONAL COMMENTS:

MED

TATRO, Amber
234335
Neurosurgery
6/10/82

Amber is 6 years old. From her head standpoint, there have been no problems of shunt dysfunction. Her last abdomen x-rays showed 10 cm of tubing left in the peritoneal cavity, and this was done in March 1982. Of concern, Amber has been walking more and more on her toes. Her hamstrings have become quite tight, and both Miss Carpenter of Scottish Rite and her physical therapist have made notes and comments about this. Her toes are curling under as well. She just had surgery for a dislocated hip. She has an up-going toe on the right. Her mother states this is not new, but I think that her gait deterioration is likely related to her tethered cord problem. She will be admitted in July for myelography and surgery.

Frederick Sklar, M.D.

1. of 21

TATRO, Amber
234335
Neurosurgery
7/22/82

Amber had her tethered cord released, and she had an uncomplicated post-operative course. She returns today for suture removal. The wound has healed nicely. I am pleased with how she has done, and I plan to see her again in 3 months' time. Her mother feels that she has a bit more knee function than she did before. Time will tell.

Frederick Sklar, M.D.

TATRO, Amber
234335
Neurosurgery
3/4/82

Amber has been doing reasonably well from a clinical standpoint, but Dr. Moody feels that her esotropia has gotten worse on the left. He has already done eye muscle surgery years ago, and he feels that new surgery will be necessary. He has questioned whether her shunt is working. She has not had any overt symptoms of intracranial hypertension. She occasionally says that she does not feel well, but her family feels that this is more related to her copying her mother. She does not complain of headache. She is occasionally irritable in the afternoon. Her school performance has been relatively stable. She had formal psychometric testing at the Scottish Rite Hospital, and this will be repeated. Of concern, her head circumference measurement has increased to 52 cm from her last measurement of 51 cm just six months ago. This moves her measurement up to the 75th percentile. There is no fluid along the shunt, and I can get a thrill on rapid successive pumping.

It has been quite some time since Amber had a CT scan and VER's, and I will arrange for these to be done. She will have repeat psychometric testing. She will have skull x-rays today to check on the status of the sutures, and abdomen x-rays to check on how much tubing is left within the peritoneal cavity. I will review these studies once they are done and get back with Mrs. Tatro. Assuming there is no problem, she will go ahead and have her eye muscle surgery, and I will see her again in six months' time.

Frederick Sklar, M.D.

IRVING INDEPENDENT SCHOOL DISTRICT
OCCUPATIONAL/PHYSICAL THERAPY REPORT

NAME: [illegible] D.O.B. 10/[illegible]

DATE: August [illegible]

[illegible]

LONG RANGE GOALS:

[illegible]

PROGRESS:

[illegible]

RECOMMENDATIONS: [illegible]

[illegible]

Occupational/Physical Therapy
Dept. of Special Education
3801 Jessamine Street
Irving, Texas 75061

8/25/83 [illegible]
Therapist

17-[illegible]

[illegible]
[illegible]/75
[illegible]
[illegible] Therapy Goals

[illegible] Therapy Goal: To further develop general mobility with bracing and [illegible] which will [illegible] in order to participate [illegible] activities.

[illegible] [illegible] Long Term Objectives: [illegible]

1. [illegible] will ambulate [illegible] approximately, within 5 minutes.
2. [illegible] will put on [illegible], with minimal assistance, within 10 minutes.
3. [illegible] will walk with [illegible] to approximately 60% of the [illegible] during the school day - [illegible] with increased ball time.
4. [illegible] will negotiate stairs with minimum assistance.
5. [illegible] will maintain full ranges of motion of her hamstring muscles.
6. [illegible] will maintain general body strength through a neuromuscular program [illegible] developed on an ongoing basis.

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...VING INDEPENDENT SCHOOL DISTRI
OCCUPATIONAL / PHYSICAL THERAPY REPORT

NAME: [illegible] D.O.B. 10-11-15

DATE: [illegible]

[illegible]

LONG RANGE GOAL:

[illegible]

PROGRESS:

[illegible]

RECOMMENDATIONS:

[illegible]

Occupational Therapist
[illegible]

[illegible]
Therapist

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August 22, 1983

Adapted Physical Education Report

Amber Tatro received adapted physical education instruction one day a week during the 1982-83 school year. During this time improvement was seen in eye-hand coordination. Amber meet the first and second short range goals which dealt with catching a bounced ball. The third short range of bouncing and catching was not reached.

During the 1983-84 school year I am recommending that Amber be mainstreamed into the regular second grade physical education class at least one day during the week. I will go with her to class to assist in any way possible. Also, I will be available to give suggestions to the physical education teacher in ways to adapt games and activities so that Amber may be involved as much as possible.

Sincerely,

Kathie Shaffer

Kathie Shaffer
Adapted Physical Education, IISD

ARD Minutes - Amber Tatro Minutes - June 26, 1983
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Present:

Names		Position
mom + dad	parents	
Barbara Lapia	friend/babysitter	
Phyllis Jones	teacher 1st & 2nd gr.	
Mary Bingfeldt	speech clinician	Suki Sagad - diagnostician
Mona Clarke	R.N.	Sam Parker - written language resource teacher, recorder
Darlene Braun	4th gr. teacher	
Susan Radford	Math resource	
Roy Curry	Principal, Chm.	

Minutes:

Neurosurgery reports were over a year old. Parents will have more recent reports, regarding 2 most recent operations and status, sent to the school. Reports of progress from OT/PT and Adaptive PE. were reported. Good progress was indicated (see reports). Achievement assessment indicated growth in all academic areas. 1st grade teacher indicates good cooperation from Amber except where fine motor activities were involved. Appeared to know rules (ie. punctuation, capitalization) but was reluctant to demonstrate skills when writing was involved. Exercises need to be adapted if writing activities are involved. Overall - average 1st grade student. Resource teacher reported progress in written expression - indicating primary need is with handwriting rather than English and spelling.

Parents indicated surgery for shunt had been recommended but will not be performed at this time. Next appraisal is due October 6, 1983 for academically, she finished 1st grade as an average student.

Behaviorally, she responded well to teacher instruction and was cooperative with teachers and peers.

Written expression will include resource help in the area of handwriting, with English and spelling

Skills re. ~~re~~ monitored. Time will be 2 19 of 21 minutes daily
The math resource teacher explained her program.
Amber will be receiving math resource for 45 minutes
daily, aiming at a mastery on mid-2nd grade level.
Mother ~~re~~ indicated Amber has difficulty saying
/r/. The speech pathologist indicated /r/ sound is a late
developing sound, an evaluation will be done within
30 school days.
Goals and objectives of OT/PT and adaptive PE. were
reviewed in Diagnostician regarding braces, crutches,
and CIC services (See Reports)
The school nurse will perform CIC services at
9:30 A.M. and 12:30 P.M. daily.
Her (Amber) assignment in Oct. '83
She will be in regular 2nd grade class.
Transportation is reimbursed. RB 10-13

Minutes were read and approved.

VI. SUMMARY OF DELIBERATIONS

A. Assessment data was considered ✓ Yes ____ No

B. Alternative placements reviewed: Regular second grade with resource classes in the least restrictive environment.

C. Additional and/or related services discussed:
See IEP for related services

D. Recommendations: See decision (E.) below.

E. Decision:
Continue regular second grade with resource classes for written language (learning of handwriting mechanics skills) and math; related services to be provided are occupational therapy, physical therapy, + counseling, of c IC on a twice daily basis. A speech evaluation within 30 working days was also requested. A routine physical education is on a consultation basis.

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I have participated in all of the decisions listed on the preceding pages:

VOTING MEMBERS

Ray L Curry
Administration Yes ✓ No ___ *

Voc. Admin. Yes ___ No ___ *

Sue Coyle
Assessment Yes ✓ No ___ *

Voc. Teacher Yes ___ No ___ *

Instruction Yes ✓ No ___ *

V.H. Yes ___ No ___ *

Parents/Student Yes ✓ No ___ *
Mary L Latta

A.H. Yes ___ No ___ *

LPAC Representative Yes ___ No ___ *

* Voting members casting dissenting votes may express objections on bottom of this form.

I give my permission for Amber Leigh Latta (Student) to receive the special education services described in this plan. I understand that my permission may be revoked at any time.

Mary L Latta
Parent's or Adult Student's Signature

5/24/83
Date

ADDITIONAL COMMENTS AND OTHERS PRESENT:

Phyllis Jones - regular classroom teacher
Barbara Tapia Babysitter
Mary Bonfield, Spanish Bilingual
[illegible] Nurse
[illegible] Special Needs
[illegible] Resource Teacher

Addendum to OT Goal.

IEP SUPPLEMENTAL GOALS 1983-84 School Year Page _____ of _____

Body - Coordination

Goal # 1: To provide body-coordination in a reclining position

Objective #1: To coordinate body in a reclining position with limited assistance.

Criteria for evaluation: Body-coord. evaluation
Schedule for evaluation: 1-84
Implementor: School nurse

Objective #2: To coordinate body in a reclining position without assistance.

Criteria for evaluation: Body-coord. evaluation
Schedule for evaluation: 2-84
Implementor: School nurse

Objective #3:

Criteria for evaluation:
Schedule for evaluation:
Implementor:

Goal # 2: To provide body coordination in the restroom.

Objective #1: To coordinate body in the restroom with assistance.

Criteria for evaluation: Body-coord. evaluation
Schedule for evaluation: 4-84
Implementor: School nurse

Objective #2: To coordinate body in the restroom without assistance

Criteria for evaluation: Body-coord. evaluation
Schedule for evaluation: 5-84
Implementor: School nurse

Objective #3:

Criteria for evaluation:
Schedule for evaluation:
Implementor: